

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 DAVID FLOYD, et al.,

4 Plaintiffs,

5 v.

08 CV 1034 (SAS)

6 CITY OF NEW YORK, et al.,

7 Defendants.
7 -----x

8 New York, N.Y.
9 March 14, 2013
9 10:10 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 BELDOCK LEVINE & HOFFMAN, LLP
15 Attorneys for Plaintiffs

16 BY: JENN ROLNICK BORCHETTA
17 JONATHAN MOORE

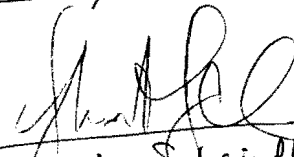
17 COVINGTON & BURLING, LLP
18 Attorneys for Plaintiffs

18 BY: KASEY MARTINI
19 GRETCHEN HOFF VARNER
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20 CENTER FOR CONSTITUTIONAL RIGHTS
20 Attorneys for Plaintiffs

21 BY: DARIUS CHARNEY
21 SUNITA PATEL
22
23
24
25

The Clerk of the Court is directed
to docket this transcript of the
March 14, 2013 conference
in Floyd v. City of New York, 08 Civ. 1034.


Shira A. Scheindlin, USDC
9/18/13

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Appearances (Cont'd)

MICHAEL A. CARDOZO, Corporation Counsel
for the City of New York

Attorneys for Defendants

BY: HEIDI GROSSMAN

BRENDA E. COOKE

JOSEPH MARUTOLLO

MORGAN D. KUNZ

SUZANNA PUBLICKER

LINDA DONAHUE

LISA M. RICHARDSON

JUDSON VICKERS

Also present: Christopher Dunn, Esq., for Ligon plaintiffs

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1 D3E6NYC1 Conference

2 (In open court; case called)

3 THE COURT: So this is our last conference before we
4 start the trial on Monday. I want to make sure that everything
5 is smooth for Monday. So anything we need to take up, this is
6 the day to take up.

7 I do have letters regarding Professor Silverman and
8 that is detailed and I will turn to it. But I had another
9 letter -- it looks like I might have misplaced it -- about
10 sequestration of witnesses and a couple other issues. I don't
11 know where that letter is, but I read it. It wasn't too
12 complicated. There were three issues raised and one of them
13 was sequestration. So let's take up the three issues in that
14 letter.

15 There was no written response to the March 12th
16 letter, right, from the City?

17 MS. GROSSMAN: That's correct, your Honor.

18 THE COURT: So we can just do it. On the witness
19 sequestration issue, have the parties agreed?

20 MS. GROSSMAN: I think we have no objection, your
21 Honor. We have no objection.

22 THE COURT: So that is agreed, that is, plaintiffs'
23 limited sequestration? It seems like there is a stop story,
24 the witnesses to that story, whether they are the witnesses of
25 the person stopped, they will not be in the courtroom until

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1 they testify, is that correct?

2 MS. VARMER: Yes, your Honor.

3 THE COURT: That is your understanding, too, Ms.
4 Grossman?

5 MS. GROSSMAN: Yes, your Honor. Other testimony
6 witnesses can sit in, but not in the particular incident in
7 question. That is fine.

8 THE COURT: Then was the topic of the sequencing of
9 liability and remedy by the police and I suspect there is a
10 dispute, but again not having heard from the City yet, I don't
11 want to rule until I have.

12 MS. GROSSMAN: Well, your Honor, we may not have a
13 dispute.

14 THE COURT: That would be good.

15 MS. GROSSMAN: Given the request of the plaintiffs, it
16 is tied into the issue that our expert on remedy is going to be
17 out -- is not available for at least a week. He is on vacation
18 and given the short notice we were not able to work around
19 that. So we would like an extra week to put in our report.
20 That would mean that -- it is currently due on April 5th. We
21 would ask until April -- not even a week -- April 11th.

22 Then we would ask since we're basing our brief in
23 response based on the expert report that we just have another
24 week to put in our remedy brief, which would mean that we would
25 extend it from April 4th to April 19th. We would just ask if

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1 we could do that then there would be no prejudice to the
2 plaintiffs because the remedy witnesses would go after and we
3 would just ask for that accommodation from the Court.

4 THE COURT: Let's separate the two issues first.
5 Despite what I may have said at any prior hearing, it
6 absolutely does make sense to have sort of the liability trial
7 so to speak followed by the remedy trial. I still am not
8 bifurcating. I don't intend to rule in the middle. We're
9 going straight from one phase to another. It makes since to
10 have all the proof on the liability on the record before the
11 person testifies with respect to remedy. That is first.

12 Second, I think at the last conference, I reiterated
13 that I would not be in Court on the 25th and 26th and then I
14 said that I had something mid-April. I made a little joke
15 about how they didn't deserve me to speak. They now remedied
16 that. I will not be here April 11th or 12th. So that is two
17 days down in that week.

18 MR. MOORE: Judge --

19 THE COURT: So we have five trial days the first week.
20 We have three trial days the next week -- 27, 28, 29. We
21 talked about Good Friday. When is that again?

22 MS. COOKE: March 29th, your Honor.

23 THE COURT: We were having the debate about a half
24 day. I didn't want to do anything that was wrong so I wondered
25 if that morning -- given who the witnesses are, maybe you don't

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1 need to be here.

2 MS. COOKE: It is not myself, your Honor. It is other
3 members of the team as well who are observant of that holiday.

4 THE COURT: You have eight or nine lawyers. I wonder
5 if we could know who the witnesses would be for that morning.
6 We can stop at 1:00.

7 MS. COOKE: I think based on the list that the
8 plaintiffs have provided of their witness order at this point,
9 they have identified who they expect to go for the first two
10 weeks and that would effect witnesses that Mr. Marutollo was
11 responsible for and several witnesses that day. So it does
12 still present a conflict for the City.

13 THE COURT: For that morning. In other years I know I
14 have used half the day.

15 MS. COOKE: The difficulty, your Honor, if you would
16 like me to explain, the observant of the holiday service occurs
17 at a time period, which the events occurred and it is an
18 observation of series of events for the Christian holiday.
19 There is not a lot of option. It is not like the church has
20 multiple services on that day. So we're not really attempting
21 to be difficult.

22 THE COURT: I know you are not attempting to be
23 difficult. I know in other years we worked out morning and
24 afternoon.

25 MS. COOKE: It doesn't appear that I will have a
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1 witness necessarily.

2 THE COURT: It might depend on the witnesses. Let's
3 keep playing that by ear. If we don't do any witnesses that
4 day, we don't. That's that.

5 Then I do intend to work the April 1st week. Who does
6 that present a problem for? 1st and 2nd are holidays. Nobody
7 is taking those. I know I should be, but I am not. Then the
8 next week is half again, 8th, 9th and 10th. Every week is
9 full.

10 So now let's turn to Ms. Grossman's request on those
11 extension. Is there a problem with the expert report is
12 delivered on April 11th, one week extension?

13 MR. CHARNEY: Yes, it is. Your Honor has already
14 given the defendants a three-week extension on their brief. I
15 think the brief is.

16 THE COURT: That is why I started with the expert
17 report. Would it present a problem for you if you received the
18 expert report on April 11th when there is no trial that day or
19 Friday or Saturday or Sunday?

20 MS. PATEL: I think the concern is that we would need
21 time to work with our expert on the response on the testimony
22 and not having -- this is a long trial. We're going to be on
23 trial every day.

24 THE COURT: Actually not. That is why we went through
25 the calendar.

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1 MS. PATEL: You are right. The Court and plaintiffs
2 didn't object at all to the defendants' having a month to work
3 with their expert on the report. It seems that another week
4 would actually prejudice us. We would be right up against the
5 same problem of potentially the witness -- our expert witness
6 being put on very soon thereafter.

7 THE COURT: Soon thereafter, but as the good news has
8 it you have a four-day recess right there where you and the
9 expert could work together without you being in trial.

10 Do you think you could have it the morning of the
11 11th, not the close of business, but 10:00 a. m., so they would
12 have all of the 11th, 12th 13th, 14th?

13 MS. GROSSMAN: If we can have it by noon, 11:59.

14 THE COURT: You would have three and a half days of no
15 trial. That is a lot to work with the expert. He is
16 apparently out of the country.

17 MS. GROSSMAN: He is out of the state on vacation.

18 MS. PATEL: Your Honor, I think if it is okay I would
19 like to check with our expert. We had discussed with him the
20 deadline of the 5th. He has other things of course that he is
21 also working on if we can just get back to you.

22 THE COURT: Like I said, though, you are trial on the
23 8th, 9th and 10th. So you are not available to work with him.
24 He would be reading it. Then the 11th, 12th, 13th, 14th you
25 would have a good chunk of time. I don't know that we'll be

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1 done with the liability case by that time given the on and off.
2 We have 16 trial days before the 11th.

3 Do you think that is going to finish the liability
4 phase?

5 MS. GROSSMAN: I don't think the plaintiffs will be
6 finished by then and the City then has to put on their
7 witnesses.

8 THE COURT: Some of them. Some of them will be called
9 in the plaintiffs' case.

10 MS. GROSSMAN: A fair amount won't.

11 THE COURT: They will not be recalled except with
12 exceptional circumstances.

13 MS. GROSSMAN: You are right. Even the new witnesses
14 who have not been called, we have a fair amount --

15 THE COURT: How long do you think the plaintiffs'
16 liability case is? Have you tried to block it out in days?

17 MR. CHARNEY: 20 to 30 days.

18 THE COURT: I don't see how you are prejudiced. We
19 only have 16 trial days before the 11th.

20 Did you want to be heard, Mr. Dunn?

21 MR. DUNN: Yes. I am sorry to be talking from the
22 cheap seats.

23 THE COURT: But you are speaking loudly so that is
24 good.

25 MR. DUNN: You made it quite clear you expect when a
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1 witness appears that is the only time he or she will appear.

2 THE COURT: Hopefully.

3 MR. DUNN: The plaintiffs have indicated they will
4 call a number of department officials as part of their case.
5 They may well have testimony that relates to remedy,
6 particularly the higher level officials. So just as the chief
7 of the department on the stand, he likely will have something
8 to say about remedy. If we have not seen the City's report
9 about remedy or relief about remedy, it will make it difficult
10 for us to think about what questions to be asking him while he
11 is there on the stand that might bear on remedy.

12 THE COURT: That seems strange to me, Mr. Dunn. The
13 lawyers at the front table have been living with this case five
14 years. If they don't know what to ask Chief Esposito, that
15 will be surprising me. You haven't been living it as long, so
16 you haven't figured out what to ask Chief Esposito but I think
17 you cross-examined him already. So all of you are well
18 prepared to cross-examine Chief Esposito. I don't think these
19 expert opinions will affect cross-examination.

20 MR. DUNN: Only in the following sense: The expert
21 says, Here are the things that do or don't need to happen for
22 purposes of remedy.

23 THE COURT: The expert says that.

24 MR. DUNN: It is a remedy expert. We have never even
25 seen that report and Chief Esposito or some other high-level

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1 official on the stand. We don't have anyway to think about
2 cross-examining him vis-a-vis the remedial position taken by
3 the City. So all I am saying is that the longer we, the
4 plaintiffs, in both cases learn what the City's actual position
5 is about remedy, we cannot factor in their position when we
6 have our one opportunity to cross-examine a City official who
7 might be on the stand during the plaintiffs' case.

8 MS. GROSSMAN: Your Honor, Chief Esposito is actually
9 not on the Ligon plaintiffs remedy witness list.

10 THE COURT: That is not his point. He didn't say he
11 was calling him affirmatively. He said when he is called in
12 the plaintiffs' case, people cross-examine witnesses, and he is
13 concerned that there are questions that one might pose to Chief
14 Esposito if they knew what your remedy expert was saying were
15 bad ideas. He is not going to propose remedies. He is going
16 to say why remedies are not necessary. He is saying that might
17 affect the strategy in cross-examining Chief Esposito.

18 The report wasn't due until the 4th, is that what you
19 said?

20 MS. GROSSMAN: Right.

21 THE COURT: I don't think it was planned that you
22 would have had that particular example. I know it was an
23 example, but you probably would not have had the time for
24 Esposito anyway.

25 MR. DUNN: That's true. I am focusing on the brief.

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1 You may recall the brief was originally due February 22nd.
2 Then it was due March 11. Now we're talking April 9th.

3 THE COURT: Are you asking for a month today on the
4 brief? I understand the week for the man who is on vacation.
5 I wasn't happy about, but I understand it. When is it? Is it
6 it due the 4th and you are asking for the 11th?

7 MS. GROSSMAN: Yes, for the report.

8 MR. CHARNEY: The brief.

9 THE COURT: No. No. I know. I am getting to the
10 brief. The report I think we're done with it. I think I am
11 going to say 11:59 or earlier on the 11th.

12 MR. MOORE: Judge, with respect to that would you
13 agree that if there are issues that do arise and the person has
14 already testified before there was time to analyze the report
15 that you would be open to recalling --

16 THE COURT: I am always open for an application for
17 good cause. I told the City that the last time.

18 Remember that, Ms. Grossman, we discussed that with
19 high-level officials, if you need to recall, show me good
20 cause? If something comes up in this remedy or expert report
21 and it really necessitates recalling Chief X, I will listen to
22 your argument.

23 When is the brief due now? Not the report. We took
24 care of the report.

25 MS. GROSSMAN: April 5th. I have of a proposal. To
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1 accommodate Ligon plaintiff concern because there are two
2 different remedy proposals --

3 THE COURT: What is two different?

4 MS. GROSSMAN: Well, the Ligon plaintiffs put in their
5 own remedy brief and the Floyd plaintiffs puts in their own
6 remedy brief.

7 THE COURT: There must be overlap, is there not?

8 MS. GROSSMAN: There is some overlap. But to the
9 extent there is not, what we can do is respond on the date that
10 we already have to the Ligon plaintiffs. But my concern is
11 with our expert, we need then to incorporate with the expert is
12 going to say into the brief. It doesn't make sense to stagger
13 it. We need that extra time and we hope the Court will indulge
14 us given the truncated schedule that we have to respond to
15 this. We just would appreciate that that accommodation.

16 MR. MOORE: Can we respond that?

17 THE COURT: Ms. Patel is standing.

18 MR. MOORE: I want to make sure --

19 MS. PUBLICKER: I see her. She is not as tall as you,
20 but she is just as visible. I see her standing, Mr. Charney.

21 MS. PATEL: I will reiterate what Mr. Dunn said. This
22 is now the third or fourth continuance sought on this brief.
23 They have had our brief for --

24 THE COURT: When was your brief filed?

25 MS. PATEL: We filed February 4th.

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1 MR. CHARNEY: No. March 4th.

2 MS. PATEL: March 4th. Simultaneously we provided the
3 expert report.

4 THE COURT: You did both on March 4th?

5 MS. PATEL: Yes, your Honor.

6 THE COURT: Ms. Grossman, why does the brief have to
7 come even later than the expert report? The plaintiffs were
8 able to do it simultaneously, the brief and the report, why
9 cannot that brief be in the 11th, which is again an extension
10 of its due date? What is the current due date?

11 MS. PATEL: April 5th, which is an extension.

12 THE COURT: I understand. There has been a fair
13 amount of extensions. It is correct you will have the
14 plaintiffs' brief since March 4th. It does seem wrong to keep
15 extending the brief day. Can you not do them both on the 11th?

16 MS. GROSSMAN: The brief is going to be based on the
17 report.

18 THE COURT: I know and you will have the report. It
19 is one thing to turn it over to adversary, but lawyers see it
20 days and days if not weeks and weeks before that. It is no
21 secret to me that also lawyers talk to the expert, work with
22 the expert. It is joint effort in every case. I understand
23 that. You are not seeing it for the first time that morning
24 that's for sure. You are working with it and with the expert.
25 It seems to me you can do them simultaneously and that is an

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1 extension and it really is prejudicial to go further. So I
2 would say both of them on the 11th at 11:59. That's enough.
3 The brief is due at the same time.

4 MS. GROSSMAN: Perhaps we can have until the end of
5 the day on the brief just so we can incorporate. What it is is
6 the logistics of when you finalize a report, then you have to
7 incorporate the final report into the brief.

8 THE COURT: Right. I still say to you are working on
9 both simultaneously. You are meshing the two documents. Both
10 briefs should be in at the same time on the same day.

11 Did we take care of topic two?

12 MS. GROSSMAN: Yes, your Honor.

13 THE COURT: That leaves with us with the
14 November 15th, 2010 letter Police Commissioner Kelly. I
15 understand the City is putting this again on its docket. I
16 ruled on this. I really have.

17 MS. GROSSMAN: Your Honor, the reason why the
18 plaintiffs object to that letter -- it is a very short letter.
19 It is to the Christine Quinn, City Council. The reason why the
20 plaintiffs objected is because they felt this was an end run
21 around Police Commissioner Kelly coming in to testify. That is
22 not what our purpose is. Our purpose is to show notice. The
23 plaintiffs have put in collaborative process as a piece of this
24 case that community input is required.

25 THE COURT: That is one of their suggestions?

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1 MS. GROSSMAN: Yes. To the extent the City can
2 demonstrate that there is a communication and a work with the
3 City Council and notifying the City Council of what it is that
4 the police department is doing, that part of the democratic
5 process is something we can redact the Police Commissioner's
6 name. This is a letter coming from the City, the Police
7 Department, saying this is what the Police Department is doing.
8 I would assure the Court that the City is not relying on one
9 letter to say this is proof that the City is doing everything
10 that is has itemized in its letter. We're going to supplement
11 that with proof from other witnesses. The purpose of the
12 letter is to show the communication between City Council and
13 Police Department that at a certain point in time this is
14 what --

15 THE COURT: What is the date of the letter?

16 MS. GROSSMAN: It is November --

17 MR. MOORE: 15th.

18 MS. GROSSMAN: -- 15, 2010. So this is a bench trial.
19 I think the Court can take it and use it for its appropriate
20 purpose.

21 THE COURT: Which is limited to your saying just to
22 show that the --

23 MS. GROSSMAN: Sure.

24 THE COURT: -- to show that the Police Department is
25 in communication with the City Council on this issue.

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1 MS. GROSSMAN: Right.

2 THE COURT: That's the whole point?

3 MS. GROSSMAN: Right. And notifying this is the plan
4 or the itemized plans of what it says it has communicated to
5 the City Council what is being done. Of course we have to
6 prove up what we have done if the letter itself doesn't prove
7 that it was done. We wanted it for that purpose.

8 THE COURT: She is saying it is not offered for the
9 truth of this. It is being offered to show those things are
10 being accomplished but merely to show that notice between one
11 city agency essentially another by the government. I guess you
12 call it the executive branch or legislative branch trying to
13 notify that branch that we are doing these things and not in
14 the context of what we're doing. Ms. Grossman admits the
15 letter is just to show that they are in communication, that
16 they are keeping those lines of communication open. That is
17 the sole purpose. The City would have to prove that the steps
18 allegedly taken are in fact taken. It cannot be offered for
19 the truth merely to show that the contact is being made between
20 the Police Department and City Council. I don't have a problem
21 with that.

22 MR. CHARNEY: The part that we're concerned about --
23 well, first, we'll just say we don't understand why that is
24 relevant.

25 THE COURT: Well, she just told you why it is

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1 relevant. You are advocating community involvement and all she
2 is saying is one of our arguments is that we're keeping the
3 legislative branch of the City notified. We notified the City
4 Council. I hope that is the right title.

5 MR. CHARNEY: Speaker.

6 THE COURT: What is your title?

7 MR. CHARNEY: I don't see how that is community
8 involvement.

9 THE COURT: You don't have to. That is a merits
10 argument you are welcome to make some other time. They are
11 saying they are keeping this person -- what is her title?

12 MS. GROSSMAN: Speaker.

13 THE COURT: Speaker of?

14 MS. GROSSMAN: The City Council.

15 THE COURT: All they want it for is to show that they
16 have kept in touch with the Speaker of the City Council,
17 period. You can then argue that is not community involvement.
18 You can argue anything you want.

19 MR. MOORE: Advocated the collaborative process, which
20 the City rejected out of hand as part of the remedy phase.

21 THE COURT: Yes, I know.

22 MR. MOORE: Saying that they are advising the City
23 Council of how they have done something with regard to the RAND
24 report, which is contained letter, doesn't go to --

25 THE COURT: That is arguing to me about the merits of
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1 it, not the procedural niceties. All she is saying you should
2 let the letter in for our desire to prove that we stayed in
3 touch with the City Council. Then you can make any argument
4 that it doesn't show anything, they haven't proved up the
5 things they said anything way. But if they want to show they
6 wrote a letter, so what?

7 MR. CHARNEY: This is remedy evidence. This is not
8 liability evidence. That is what Ms. Grossman said, we are
9 using it so show the community involvement issue that we
10 raised.

11 THE COURT: That is what she said.

12 MR. CHARNEY: That is the first thing. To be clear,
13 it does not go to liability.

14 THE COURT: I don't know.

15 MR. CHARNEY: When I say "I don't know," I don't know
16 what Ms. Grossman's position is.

17 Ms. Grossman.

18 MS. GROSSMAN: Well, I believe that there is a lot of
19 overlap between remedy and liability. I think that is one of
20 the challenges. So I do believe that could be used on
21 liability as well.

22 THE COURT: How would you argue that? How does it
23 affect liability? Just the sentence. The only thing you are
24 using it for is just to show that the Police Department kept
25 the City Council apprised.

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1 MS. GROSSMAN: There is also a claim of deliberate
2 indifference and so we believe this goes to that.

3 THE COURT: You believe that the City staying in touch
4 with City Council proofs that they didn't act with deliberate
5 indifference?

6 MS. GROSSMAN: That's true. From a mechanics
7 standpoint, you want us to be efficient in terms of polling
8 witnesses. Does it make sense for one letter to have someone
9 come back and say on remedy let's call this person and say this
10 letter was sent.

11 THE COURT: No. But are we still arguing about the
12 NYCLU report that the City says it never received? That sounds
13 fantastical to me. By the same token, do they need to find the
14 person that put it in the mail or walked it over? You don't
15 want to concede this report was received when all the evidence
16 seems to point to receipt? Do you want them to find that
17 witness still? It seems like a goose and gander approach. I
18 understand why you want this letter and it is fine with me.

19 MS. GROSSMAN: Thank you, your Honor.

20 THE COURT: What is your position on NYCLU report?

21 MS. GROSSMAN: I stand by the position I took at the
22 last conference.

23 THE COURT: That the City is not conceding the Police
24 Department ever received it?

25 MS. GROSSMAN: I have not received any confirmation
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1 that anyone received it and so I reluctant as to lawyer to --

2 THE COURT: If your client denies receipt...

3 MS. GROSSMAN: So I take the position that -- that is
4 why I wanted to have the plaintiffs verify.

5 THE COURT: No. I guess they will be able to call any
6 City witness, hundreds if necessary, to ask about receipt of
7 the report. It seems like if someone commented on it, they
8 must have received it.

9 MS. BORCHETTA: Your Honor, if we can have one moment?
10 (Pause)

11 MR. CHARNEY: Your Honor, on this Kelly letter just so
12 we can --

13 THE COURT: It is a limited purpose and they are
14 welcome to argue that. It goes to proving that they did not
15 act with deliberate indifference. It is still being offered
16 for one sentence, the one sentence is the City Police
17 Department stayed in touch with the City Council at least as of
18 November 2010.

19 MR. CHARNEY: Just to make sure the substance of
20 letter, in other words, all of the RAND recommendations which
21 the letter sets forth the City has made effort to implement,
22 none of that comes in?

23 THE COURT: Not as proof. It comes in to show that
24 the statement was made, but it doesn't prove that the City
25 implemented anything.

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1 MR. CHARNEY: Okay.

2 THE COURT: It cannot be offered for the truth. The
3 City would have to prove that it implemented it. I will not
4 take it as truth that the City implemented anything. That the
5 City told somebody they did, that is the point. That is not
6 offered for the truth. It would could have been a lie, but the
7 notice was given. They need to prove that they implemented
8 something.

9 MR. MOORE: I apologize for stringing this out, but it
10 could go to liability because it could show that they were not
11 deliberately indifferent.

12 THE COURT: They are going to argue that.

13 MR. MOORE: So that in effect is the same thing they
14 were they prevented from doing before, which is Kelly
15 testifying.

16 THE COURT: No. It is not offered for its truth. I
17 will not accept the letter proves they implemented anything.
18 You have a sophisticated trier of fact. I get the point.

19 MR. MOORE: If it is not accepted for the truth, it
20 can never go to the issue of deliberate indifference.

21 THE COURT: That is a good point. You can make that
22 argument during summation. It is not hard for me to understand
23 those legal thoughts. I do this every day all day for years,
24 for decades.

25 MR. CHARNEY: Our concern is obviously the trial
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1 record is important not only for you but if there is an appeal
2 and our concern is if there a letter in the trial record --

3 THE COURT: I said three times. With all the lawyer
4 power that you have here somebody should mark this point in the
5 transcript so you can tell the appellate court it is not
6 accepted for the truth of it. It does not prove that anything
7 was implemented. I will not accept it for proof that something
8 was implemented. So when the City makes a deliberate
9 indifference argument, you will say, Your Honor, it cannot
10 prove that. All it can proof is what it purports to prove that
11 the Police Department said something to the Speaker of the City
12 Council. We don't know what they said was true or not. Put a
13 little mark on the transcript somebody. So we took care of
14 that. You can have your letter back.

15 Before we turn to the Silverman Eterno issue are there
16 any other details for Monday's trial that we need to talk
17 about? By the way, just in case you know my clerk was in touch
18 with you on an overflow room. Was anybody in touch with you?

19 MS. COOKE: We received an e-mail from Mr. Brazil that
20 said it was the 26th floor courtroom.

21 THE COURT: Then the plaintiffs did also?

22 MR. CHARNEY: Yes. Thank you.

23 THE COURT: I think we did that for the first day.
24 Did you need it for more than that?

25 MR. CHARNEY: Is it possible to have it for the first
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1 week?

2 THE COURT: I don't know the resources of the
3 building. We have to ask. We can play it day by day. If they
4 can give it to us for the second day and nobody is there.
5 There are only some courtrooms.

6 MR. MOORE: It is like a Broadway show. If nobody
7 shows up, it is canceled.

8 MS. GROSSMAN: One housekeeping matter. The City asks
9 permission to have two attorneys deliver the opening?

10 THE COURT: Sure.

11 Anything else? Any small point?

12 MS. GROSSMAN: Your Honor, we have one small point
13 regarding the exhibits to be used for plaintiffs' opening. We
14 received it today.

15 THE COURT: Good.

16 MS. GROSSMAN: We have one issue with one of the
17 documents, one of the pieces of evidence that we have a problem
18 with and we object to and it is listed on a pretrial order. So
19 it may be that we wait until we get to that on the list of
20 exhibits that we're talking about rulings.

21 THE COURT: No. Today, you mean?

22 MR. CHARNEY: Yes.

23 MS. GROSSMAN: I thought at today's conference we were
24 going through some of the issues on the joint pretrial order.

25 THE COURT: Why don't we take it out of turn and do
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1 it.

2 MS. GROSSMAN: Ms. Publicker will address you.

3 THE COURT: Do I need the exhibit?

4 MR. CHARNEY: I assume you are talking about this one?

5 MS. PUBLICKER: Plaintiffs' Exhibit --

6 MS. BORCHETTA: 16.

7 THE COURT: I was handed two different things.

8 MS. PUBLICKER: I believe, your Honor, the black and
9 white copy is what we provided in course of discovery and Ms.
10 Borchetta questioned Lieutenant Korabel about at his
11 deposition. The color copy we received earlier this week. The
12 color copy is what they would like to use in their opening
13 statement on Monday.

14 MS. BORCHETTA: Also to further clarify, this entire
15 document that you have been handed is four pages.

16 THE COURT: Four pages. I will state for the record
17 it is PL001003 through 1006 -- no, 1005-A.

18 MS. BORCHETTA: Yes. That is the entirety of what is
19 on Plaintiffs' exhibit list as part the JPTO as Exhibit 16.

20 THE COURT: What is it?

21 MS. PUBLICKER: So, your Honor, what this is is it
22 appears to be a Facebook posting of alleged T-shirts from the
23 30th precinct. According to this these pictures were posted
24 between one and six months after the stop of Devin Almonor.

25 THE COURT: Who.

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1 MS. PUBLICKER: Devin Almonor, the first witness on
2 plaintiffs' witness list. He was stopped in the 30th precinct.
3 These photos were not uploaded to Facebook until one month and
4 six months.

5 THE COURT: I am sorry. Whose Facebook page?

6 MS. BORCHETTA: Your Honor, if I may provide some
7 background on what these documents represent. These represent
8 T-shirts that were sold by -- T-shirts sold with the 30th
9 Precinct Club. One of our witnesses that we're calling is
10 Lieutenant Korabel. He is one of the police officers who
11 stopped Devin Almonor, who is a class member witness.
12 Lieutenant Korabel, who is the supervisor in the 30th
13 precinct --

14 THE COURT: Still?

15 MS. BORCHETTA: Now he is a lieutenant elsewhere. At
16 the time of the stop of Almonor he was a supervisor in the 30th
17 precinct and he testified that he saw the pages that are
18 stamped PL001004 and 5, the second and third pages. He saw
19 pictures that looked like this on the back and front of a
20 T-shirt that was sold by 30th Precinct Club.

21 THE COURT: What is the 30th Precinct Club?

22 MS. PUBLICKER: It is not affiliated with the police
23 itself. It an organization that the police officers form on
24 their own to collect money for when police officers, family
25 members dies or become ill and they distribute the funds for

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1 those officers. Ms. Borchetta questioned Lieutenant Korabel
2 about this. He was not a member of the 30th Precinct Club. He
3 did not have any of these T-shirts. He has never bought one.
4 So to the extent that plaintiffs are using this to try and show
5 poor character on the part of Lieutenant Korabel when he has
6 never admitted to own one or they are using the 30th precinct
7 to impugn the character of Lieutenant Korabel, it is
8 irrelevant.

9 MS. BORCHETTA: Your Honor, that is not the basis on
10 which we're submitting this document.

11 THE COURT: I am having trouble understanding still
12 what this document --

13 MS. BORCHETTA: The page that is stamped PL1005 is an
14 you unclear copy of the top 10 statements made by perps.

15 THE COURT: The top 10 statements made by?

16 MS. BORCHETTA: Perps, p-e-r-p-s. The last page of
17 the exhibit, which is 1005-A is a better copy of that.

18 THE COURT: Right. I don't what this document is.

19 MS. BORCHETTA: These are pictures of a T-shirt that
20 Lieutenant Korabel saw and he testified that he saw it while he
21 was working at 30th precinct, sold by 30th precinct officers.
22 The purpose of this document is not at all to impugn Korabel's
23 character, but it is to show that we believe these statements
24 on this T-shirt both make fun of stop victims and also
25 perpetuate stereotypes about the communities we allege are

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1 being targeted for this stop and frisk tactic. We believe that
2 that shows two things: Both bias by some police officers and
3 also notice to the City that they are needed to be action to
4 address potential bias by police officers in conducting stops
5 and frisks. That is the purpose.

6 THE COURT: Does Lieutenant Korabel say when these
7 words, the top 10?

8 MS. BORCHETTA: He said that while he could not recall
9 the exact date, it was prior to 2012.

10 MS. PUBLICKER: However Devin Almonor was stopped in
11 March 2010.

12 MS. BORCHETTA: It is separate and apart from the
13 stop.

14 THE COURT: I realize that. He couldn't date it. He
15 said he saw it sometime before 2012?

16 MS. BORCHETTA: Yes, your Honor.

17 THE COURT: We don't know when.

18 MS. PUBLICKER: He could not recall.

19 THE COURT: It could be December 2011.

20 MS. BORCHETTA: Right. He said it could have been
21 before the stop.

22 THE COURT: It could have been as late of December of
23 2011 because all he would say it was before 2012.

24 MS. BORCHETTA: Right.

25 THE COURT: Your strongest argument is that as of no
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1 later than December 2011 at least some high-ranking officers in
2 the 30th precinct saw this T-shirt message and therefore should
3 have been aware that there may have been biases by some
4 officers. That is the most general way you can put it.

5 MS. BORCHETTA: Also, your Honor, I asked him whether
6 he as a supervisor in the 30th precinct upon seeing this
7 T-shirt addressed it in any way with any of the officers under
8 his supervision and he said no.

9 THE COURT: Did he say where?

10 MS. BORCHETTA: He said he did not remember where. He
11 knew it was being sold by the 30th Precinct Club and he
12 couldn't remember whether or not it was within the precinct
13 property.

14 MS. PUBLICKER: He did testify that he did not believe
15 it would be appropriate for officers to wear that T-shirt when
16 they were on duty and in the 30th precinct.

17 MS. BORCHETTA: But --

18 THE COURT: You cannot interrupt. It is not going to
19 work that way. She is speaking, you are not.

20 MS. PUBLICKER: However, he stated that -- he did
21 state that if they were on their private time that they did
22 have a constitutional right to express their free speech.

23 THE COURT: That is true. No one is quarreling with
24 that. So I understand it the limited purpose of allowing this
25 at all would be for argument that at some point in time no

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1 later than 2011 he saw this, not sure where or when, and didn't
2 take any action or it didn't cause him to have any training
3 session or meeting of the precinct and discussions about it.
4 That is all they can prove, that he saw it and it didn't
5 trigger any reaction, official reaction on his part to do
6 anything having seen it. That is the only use, period.

7 Again it is not offered for the truth. It is not
8 offered to show that some police officer wrote this. I don't
9 know who wrote this. It could be someone in the community
10 wrote in. He saw it. Your only point is he didn't do anything
11 about it.

12 MS. PUBLICKER: Well, he testified, your Honor, that
13 there was -- at some point after Lieutenant Korabel seen these
14 T-shirts, there was a change in the Police Department policy
15 disallowing the creation of these T--shirts.

16 THE COURT: That is fine. You can offer that. I am
17 taking it solely for the limited purpose again not for the
18 truth of the statement -- I haven't read it yet. It is not
19 terribly important that I do -- but that he saw the words
20 written on it and according to plaintiffs his testimony is he
21 did nothing about it officially at or about the time he saw it.
22 That's the only purpose which I take it.

23 MS. PUBLICKER: There is an issue, however, your
24 Honor, because when plaintiffs showed the version to Lieutenant
25 Korabel, he said that he could not read the back.

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1 THE COURT: Could not?

2 MS. PUBLICKER: Could not read the back. He didn't
3 know what it said. He said that he saw something like this.

4 MS. BORCHETTA: We would submit we put them together
5 as exhibits because it is obviously the same document and we'll
6 have to ask him about it.

7 THE COURT: If he said he couldn't read the words that
8 eliminates the notice point.

9 MS. BORCHETTA: He said he saw a shirt that looks like
10 this, the back of the shirt. And then if you look at the next
11 page, if you overlay it, it is the same.

12 THE COURT: I am missing your points.

13 MS. BORCHETTA: When he saw on the T-shirt which would
14 have been clear, our point is he identified. I showed him the
15 two pictures and he said the one with the skull is the front
16 and the one with the list was the back. I saw that.

17 THE COURT: That's true. I past hundreds of T-shirts
18 and I can't read most of the words. Sometimes I am curious,
19 but I can't read the words because I pass them fast.

20 MS. BORCHETTA: What I would submit, though, is that
21 these -- we believe these are obviously the same documents.

22 THE COURT: That is true. I am not sure if he saw the
23 words. Let's say I am walking to work, right? I am going to
24 give you an example. I am walking down the street and I see a
25 T-shirt with words and I am actually interested. I try to read

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1 the words, but too late, the person is gone and I never figure
2 out what it said. I saw the shirt, but I don't know what the
3 message was.

4 MS. BORCHETTA: He didn't testify that he didn't see
5 the shirts. He said he couldn't clearly read the copy.

6 THE COURT: I don't know that he saw these words. He
7 recognizes the skull and the 30th precinct and he also saw
8 there were words on the back. I don't know that he knows what
9 those words were.

10 MS. BORCHETTA: Now that we have a better copy --

11 THE COURT: He saw it. Seeing it and reading the
12 words are completely different. Usually a person is moving in
13 a T-shirt. I don't know if the T-shirt is being worn. I don't
14 know if the T-shirt was hanging. The long and short is I don't
15 think this should be used on opening. If you want to use it
16 for Korabel, I will listen to the testimony. It is giving a
17 list of things as if the Police Department had notice of this
18 list and I don't think there is any proof of that yet. I will
19 not allow it for openings. Good luck with Korabel. That is my
20 ruling. That is Exhibit 16.

21 Now, anymore smaller items before we turn to the
22 Silverman situation?

23 MS. BORCHETTA: Can we clarify? I think we understood
24 that we might be raising some of the issues around objections
25 that are in the GPTO that we submitted on Monday. I think we

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1 just want clarification whether the Court wants us to raise
2 certain things now or wait until --

3 THE COURT: I would try to do it now. Although, I
4 don't have that material in front of me.

5 MS. BORCHETTA: So I suppose my question is whether
6 you want us to do that before or after Silverman?

7 THE COURT: We'll do it after Silverman. We'll take a
8 quick break so I can get the papers in front of me.

9 This Silverman situation is getting troubling. There
10 are a lot of letters back and forth late in the day of this
11 trial. I think in short that he should be deposed. I don't
12 know why he has to be the fifth witness. There is nothing holy
13 with the order. Why can't he be pushed back so there is
14 time to do this deposition? Surely not everybody is taking off
15 Monday and Tuesday. Some of us are and some of us are not.
16 Ms. Cooke, for example, is taking Good Friday but not Passover.
17 She is available to take Silverman -- Oh, he is probably not
18 come to think about it. I don't know. Surely something can be
19 worked out somewhere to get his deposition done. Why does he
20 have to be the fifth witness as opposed to tenth or fifteenth
21 witness. There is nothing holy about that. I think he should
22 be deposed. I think that will stop a lot of the wrangling.

23 Unlike criminal litigation, nobody wants an undeposed
24 witness. People get so nervous. They think the world will
25 come to an end if they don't depose every single witness. I

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1 said long ago that if a witness is listed on the exhibit list,
2 even if they weren't deposed in the discovery period, under the
3 pilot project rules they would be deposed even if they are a
4 late-named witness. I think he should be deposed. That will
5 stop some of the wrangling.

6 MR. CHARNEY: A couple requests on that. Where your
7 Honor was going on the dates, I think that that would work
8 better for us. In other words, maybe do it on one of those
9 trial days we're not on trial.

10 THE COURT: I don't know about Silverman.

11 MR. CHARNEY: Assuming he is available, we would
12 ask --

13 THE COURT: That's an assumption.

14 MR. CHARNEY: I understand. We're going to talk to
15 him. If he is available, we will ask the deposition be held
16 then and not at some point during the trial.

17 THE COURT: I agree. He is more likely to be
18 available Monday because Monday isn't the holiday, that is for
19 the people who cook.

20 MR. CHARNEY: The second request, your Honor, is if we
21 can limit the time. As we said over and over again in our
22 letters, his testimony is going to be very limited. He did the
23 surveys and he is only go to testify about very narrow portions
24 of that.

25 THE COURT: That is the plaintiffs' position that they
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1 don't seem to appreciate the defense position. Once you put
2 the witness up, you cannot control in fairness the
3 cross-examination. So while you want to offer him only for the
4 three of the questions, if they want to talk about three other
5 questions, I think they should be allowed to do it. What he is
6 being really called for is his survey, the results. They can
7 ask about different questions on the survey as long as it is
8 relevant. As I said all along the efficacy of stops and frisks
9 is not an issue for me or any court. The only issue for the
10 Court is constitutionality, not efficacy. I am not a
11 policymaker.

12 MR. CHARNEY: We agree with that.

13 THE COURT: Whether it is effective or not, I don't
14 think that was the question. He asked the police officers to
15 pressure to reduce crime, which is a little different than
16 efficacy. I know you are only offering it for a limited
17 purpose, but you are offering the survey.

18 MR. CHARNEY: I understand that. There are obviously
19 free to ask questions about the results of the survey. I guess
20 our concern is his methodology is set forth clearly in his
21 articles.

22 THE COURT: I understand that.

23 MR. CHARNEY: And as far as I can tell, the deposition
24 is to really get into that stuff to figure out what he did, how
25 he did it, how he analyzed it, and to make him sit there for

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1 eight hours to talk about one very narrow methodology, and
2 we're not talking about Jeff Fagan with 10 different --

3 THE COURT: I understand. The City doesn't have time
4 to waste either. I am sure they will not take eight hours if
5 they don't need eight hours. They are not going to do it to
6 run the clock out. They are busy those days. Everybody is
7 busy. They are in the middle of trial and holiday prep. They
8 are not going to fool around. They are going to get what they
9 need and go home. I don't know why it would take eight hours,
10 but I am not going to limit it either. I am going to count on
11 people's common sense and good faith to get it done.

12 MR. CHARNEY: Are there certain --

13 THE COURT: I suggest to you the best possible day is
14 Monday.

15 MR. CHARNEY: I guess then on that same topic are
16 there certain issues that they shouldn't be allowed to go into.
17 This is a prolific writer. I don't know how many questions
18 they are going to go into with him, none of which have to do
19 with the survey keep in mind, but obviously have to do with the
20 larger issues that are relevant in this case.

21 THE COURT: Well, since the efficacy of the stop and
22 frisk program -- I don't think the City likes that phrase -- if
23 there is such a program, the efficacy of it is not an issue at
24 this trial. To ask him questions about that would be
25 irrelevant. The relevance objection should be pressed.

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1 MR. CHARNEY: What about issues he has written about
2 in terms of how the com set is structured, the way they analyze
3 crime data? Again, possibly relevant to this case, but not
4 what he would testify about at all, not even a subject of the
5 survey.

6 THE COURT: Then I would say, no, the subject of his
7 direct testimony is the survey, the results of the survey. If
8 it is not part of the survey, then it is not appropriate.

9 MR. CHARNEY: Okay.

10 MR. KUNZ: I think there may be questions that can get
11 towards Mr. Silverman's bias and how he constructed the survey.
12 For example, the many articles he has written on his opinion on
13 com stat, I may at his deposition may want to ask questions
14 about those to flush out his opinion and to the extent that
15 made its way into --

16 THE COURT: He is not an expert. The letter the City
17 wrote, The issue of this new expert witness -- and I circled
18 that. He is not an expert witness. He is not a new expert
19 witness. He is a fact witness because he did this survey and
20 the survey results the plaintiffs think is relevant. He didn't
21 prepare this survey at their requests. They didn't help design
22 it. He is a researcher who was doing his own thing.

23 MR. KUNZ: Your Honor, I do think there was some
24 discussion about whether or not he was an expert in the survey
25 construction and phrasing --

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1 THE COURT: He is not being offered as one. He may be
2 one in some other trial about, who knows what, copyright
3 infringement and he can explain how to design surveys. He is
4 not an expert in my opinion.

5 MR. KUNZ: We may have questions about particular
6 phrasing of questions.

7 THE COURT: You probably do.

8 MR. KUNZ: Indeed.

9 THE COURT: He is not being called as an expert. He
10 didn't have to produce an expert report. His report on survey
11 is a report, but I am going to allow the deposition because
12 civil litigation lawyers break out in hives if they don't get
13 deposition before they testify. We tried criminal cases where
14 freedom is at stake but not without depositions. You folks
15 think you cannot have a witness on the stand who wasn't
16 deposed. That is the way it is these days.

17 MR. KUNZ: I appreciate that ruling, your honor. The
18 other aspect of the defendants' motion here was data.

19 THE COURT: I am not sympathetic to the data point. I
20 will tell you why: You have the results. The results are in
21 front of you. The only reason for the underlying data is to
22 basically check the math or something to see if it is honest.

23 MR. KUNZ: And to do different math, your Honor.

24 THE COURT: Basically it is to do that. They gave you
25 underlying data on three or four or five questions that is

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1 subject of his direct. If his math was inaccurate, you already
2 can cross-examine and show that he jiggered the numbers or
3 something.

4 MR. KUNZ: I will give you an example how we're
5 limited. The 2012 survey broke down the respondents in three
6 categories: Three com stat, ostensibly the Giuliani years and
7 ostensibly Bloomberg years. We only have for the 2012 survey
8 the earlier dividing line, pre1995, post1995. We don't have
9 the dividing line later on.

10 THE COURT: I don't understand. Can you help me? I
11 have the survey in front of me. Show me what you are talking
12 about.

13 MR. KUNZ: Well, on the 2012 survey Questions 15, I
14 lay out the specific numbers in the letter.

15 THE COURT: Question 15: What year did you retire?
16 You you don't have --

17 MR. KUNZ: No, we don't have that.

18 THE COURT: What do you have?

19 MR. KUNZ: The professor has created a field that says
20 did the person retire before 1995 or after 1995. We don't have
21 the specific year that the people retired.

22 MR. CHARNEY: Can I respond?

23 THE COURT: No. No. Because I would like to follow
24 what is on the survey and understand what the defendants have
25 already. That is what I would like to know.

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1 So when it says what year did you retire, the person
2 writes a year in?

3 MR. KUNZ: Yes. I believe so. This is a web survey.
4 There is a drop-down menu.

5 THE COURT: So the person puts the year in. What do
6 you have?

7 MR. KUNZ: I have a yes or no did the person retire
8 before --

9 THE COURT: How can you have a yes or no?

10 MR. CHARNEY: Your Honor, can I respond?

11 THE COURT: Yes.

12 MR. CHARNEY: Just to clarify, the way the results
13 were analyzed is they didn't actually -- Silverman and Eterno
14 did not take the retirement year and factor it into their
15 analysis. What they did is based on the retirement year, they
16 divided the respondents into three groups -- pre-'95, '95 to
17 '01, and '02 to the present. So for each person once they gave
18 the year, they were put into that group and they created a data
19 set in which every single response was put into either pre-'95
20 and that dataset we gave to the defendants because with that
21 dataset they can then run the numbers that Silverman and Eterno
22 ran to see if they get the same results. So Silverman and
23 Eterno never used the year in any way to analyze the data.
24 That was not part of their analysis. So it is not correct to
25 say we need the year they retire to be able to replicate the

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1 analysis.

2 THE COURT: Because they know which of the three
3 buckets?

4 MR. CHARNEY: Right. They put everyone into a bucket
5 and assigned them pre'95, '95 to '01, '02 to the present.

6 THE COURT: How many respondents were there in 2012?

7 MR. CHARNEY: 1900. They have every single response.

8 THE COURT: What do you mean every single response?

9 MR. CHARNEY: Sorry. They have data on every single
10 respondent. For every respondent, whether they are pre'95--

11 THE COURT: Right. So they know the breakdown. They
12 know there are 500 in one bucket, 200 in another bucket.

13 MR. KUNZ: That is not correct, your Honor. If
14 Mr. Charney is representing that the plaintiffs are willing to
15 give us each of those three buckets that helps all the dispute.

16 THE COURT: You don't know how many are in each of the
17 three buckets?

18 MR. KUNZ: I know pre-1995 bucket and post-1995
19 bucket.

20 THE COURT: You don't know how many are in the three
21 buckets?

22 MR. KUNZ: Yes.

23 MR. CHARNEY: That was not my understanding.

24 MR. KUNZ: If they are willing to give that to us,
25 great. We need that. I would posit that just because these

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1 professors did not look at the dates of retirement doesn't mean
2 that we can't cross-examine them.

3 MR. CHARNEY: Of course.

4 THE COURT: It does. He is presenting the results of
5 the survey. This is not a retained expert. Would you please
6 get the numbers, raw numbers. 500 or 600 or 1200, whatever
7 equals 19.

8 MR. CHARNEY: Yes.

9 MR. KUNZ: The only other issue here, your Honor, was
10 the additional questions having to do with pressure.

11 THE COURT: I am in the survey.

12 MR. KUNZ: Question 2. So we have A, B and C. I
13 believe I want -- and H. And I believe we want D and E, which
14 has to do with pressure to decrease crime.

15 MR. CHARNEY: This goes back to the point you made,
16 your Honor, which was the only reason they need the raw data is
17 to replicate the analysis.

18 THE COURT: Yes. That is what I think, too. You have
19 the results. You know how many checked box one through nine or
20 ten, right?

21 MR. CHARNEY: They have that percent of the
22 respondents.

23 THE COURT: It goes to one, the least pressure, and 10
24 is the most pressure. So the 1900 you know basically is the
25 breakdown.

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1 MR. KUNZ: Well, we do know the professors' analysis,
2 the progression analysis, on the raw numbers. But, no, we
3 don't note raw numbers for those particular values.

4 MR. CHARNEY: That is not true. They actually put the
5 percent. In other words, this percent of respondents said it
6 was high pressure. They have more than just the regression
7 analysis.

8 THE COURT: Of course.

9 MR. KUNZ: The problem here too is that the two
10 surveys changed. The professors changed their methodology
11 between the 2010 article and 2012 article. For 2010 article we
12 don't have three buckets. The professors didn't look at the
13 three buckets; they only looked at two. So I think it is fair
14 for us to go into the data, create the three buckets and see if
15 it changes.

16 THE COURT: Actually, it is not. If this person was a
17 retained experts, I would understand turning over the data. I
18 have big environmental cases and I have scientists and I do
19 make them produce raw data and they are not happy about it.
20 This is a totally different thing. These folks did what they
21 did. It is a limited purpose. You do have the statistics. It
22 says, 37 percent of 1900 checked great pressure. You can do
23 the math yourself. What is 37 percent of 1900? Figure it out.

24 MR. KUNZ: That is another issue, your Honor. The
25 professors break it down. It is one to ten, one being low and

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1 10 being high. The professors break it down as eight, nine and
2 10 being high pressure. If you move that down to seven, eight,
3 nine and 10, it will change the results. Six seven, eight and
4 nine will change the results. This goes into what weight your
5 Honor should put into the survey. I cannot do that when they
6 are withholding the data.

7 MR. CHARNEY: They can cross and point out what they
8 call methodological flaws. They can say, Why didn't you use
9 year as opposed to period of time? Why did you group the
10 pressure answers?

11 THE COURT: That is the point. That is why I think
12 you are entitled to a deposition. I am not going to have him
13 produce all this data at this point. I did have a question
14 before I make that final ruling. The City's letter says it is
15 very easy and there is no burden at all. I have a marginal
16 note saying, Is that true, somewhere in the City's letter.

17 MR. KUNZ: I believe that is the case, your Honor.

18 THE COURT: Hold on. Hold on a minute, please. There
19 it is. There is a sentence that says, "Moreover since the data
20 is kept electronically on SPSS software, which can easily be
21 produced and which requires no redaction, there is no burden to
22 plaintiffs or to the professors who conducted the survey for
23 production of the data." Is that true? Is it that easy?

24 MR. CHARNEY: That I don't know because this isn't my
25 retained expert.

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1 THE COURT: Well, with respect to D and E if it means
2 that much to them and it is so easy that won't affect the
3 confidentiality point that you raised.

4 MR. CHARNEY: Pressure to decrease crime.

5 THE COURT: The two questions about pressure to reduce
6 crime. If it means that much to them to massage it and said it
7 should have been seven through 10 or six through 10 and if it
8 is that easy and it doesn't affect anonymity, you can figure
9 out who is who and there is danger in that. I am not going
10 there. For D and E you could find out from Silverman or
11 Eterno.

12 MR. CHARNEY: Eterno has the data.

13 THE COURT: Eterno has the data and Silverman may be
14 free on Monday. Go ahead and give them D and E if it is not
15 burdensome.

16 MR. KUNZ: The corresponding ones from the 2008.

17 THE COURT: Yes. Just for that pressure question.
18 Fine.

19 Now I think we're ready for a very short break and I
20 will see what we can do.

21 MR. KUNZ: I am available on March 26th that Monday to
22 take his deposition. Do we have a date for the production of
23 data.

24 THE COURT: He hasn't made the phone call yet. We can
25 only go so far.

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1 MR. KUNZ: Thank you, your Honor.
2 THE COURT: Today is the 14th. The phone call hasn't
3 been made. I hope that will work out.
4 We'll reconvene in three minutes.
5 Did we get a hard copy of the joint pretrial order
6 that was filed Monday? My clerk didn't think we got a hard
7 copy.
8 MR. MOORE: I have a hard copy.
9 THE COURT: Was one delivered?
10 MS. BORCHETTA: We did not know that was part of
11 the --
12 THE COURT: A hard copy would be good.
13 MR. MOORE: Can I have a word with you?
14 THE COURT: It's not related to this case?
15 MR. MOORE: It is related to my availability.
16 THE COURT: Personal matter, maybe a personal issue,
17 health or something?
18 MS. GROSSMAN: If that is what it is, that's fine.
19 MR. MOORE: That's what it is.
20 THE COURT: Fine.
21 (Recess)
22 THE COURT: Please be seated.
23 Now, I have to say I thought we had worked on this
24 problem, but we need to work on it more. In the first half of
25 this morning's session many of you fell back on your older bad
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1 habits of conferring while I am speaking and that makes it
2 difficult for me and makes it difficult for the court reporter.
3 I asked you and asked you and some of you got very good at it
4 for a while and say, May we have a moment, and I say, Sure, and
5 everyone confers. I think Mr. Charney you are singled out.

6 MR. CHARNEY: I am a bad offender.

7 THE COURT: You are a bad offender.

8 MR. MOORE: Repeat offender.

9 THE COURT: That too. When you do that it is
10 disturbing for the record and for me. If he want to talk to
11 your colleagues, all you have to do is say is, May I have a
12 moment. I thought we got that all figured out.

13 The other thing is, Ms. Borchetta, you were the
14 biggest offender on this one, you cannot interrupt each other.
15 When one attorney is on her feet as much as you want to say,
16 That is not true, you have to wait your turn.

17 MS. BORCHETTA: Yes, your Honor. Sorry.

18 THE COURT: I think both sides of course.

19 Now, on this joint pretrial order, I did say I would
20 try to rule as much as possible to make the trial smoother but
21 because a courtesy copy was not provided we missed a beat. I
22 am not prepared, but I will do it on the spot.

23 Where should I start, or where can I start?

24 MR. CHARNEY: Your Honor, we thought a good way to
25 start is to start with Plaintiffs' exhibits.

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1 THE COURT: That's fine. You are first.

2 MR. CHARNEY: There are several kind of buckets, in
3 other words, objections that come up.

4 THE COURT: Should I start with Exhibit A?

5 MS. BORCHETTA: Yes, your Honor.

6 MR. CHARNEY: Yes, your Honor.

7 MS. BORCHETTA: B.

8 MR. CHARNEY: Are you looking at Exhibit B? Ours are
9 numbered, 1, 2, 3 and so forth.

10 THE COURT: I think so. Plaintiffs' witness list with
11 defendants' objections.

12 MR. CHARNEY: We can start there.

13 THE COURT: Is that a good place?

14 MR. CHARNEY: That's fine. I thought we were going to
15 do exhibits. Exhibit B is the witness list. Sorry, exhibit
16 lists. Exhibit B is the exhibit list.

17 THE COURT: Let me try to find that. Okay, Exhibit B.
18 You are trying to say groupings.

19 MR. CHARNEY: So one of the broad objections that
20 comes up over and over again is defendants' objection to the
21 admission of records relate to CCRB investigations and findings
22 and we disagree with that objection and Ms. Borchetta can tell
23 you why we disagree with that objection.

24 MS. BORCHETTA: We thought that would be a good place
25 to start since it applies to a lot of the documents and defense

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1 objections. So the defendants are objecting to CCRB findings
2 letters and I know the Court has seen a lot of CCRB documents,
3 but these are letters froms CCRB saying to either an officer or
4 to someone who has submitted a CCRB complaint, We have
5 conducted an investigation and we have done a thorough
6 investigation and we have come to the following findings. Then
7 it lists out, for example, abuse of authority and then it says
8 exonerated, unsubstantiated or substantiated as the finding.
9 Those are what we are calling CCRB findings letters. I have an
10 example if the Court would like to see it.

11 THE COURT: Yes. What is your theory?

12 MS. BORCHETTA: So our theory of admissibility is that
13 this is an exception to hearsay as a public record because it
14 states under 803(8)-- we believe they are public record
15 exceptions because these are regularly created by the CCRB and
16 sent out as a matter of course once the board of CCRB has voted
17 after an investigation.

18 THE COURT: Let's start by reading the rule. 808(8):
19 A record or statement of a public office if: A. It sets out
20 the office's activities, a matter observed while under a legal
21 matter to report but not a criminal case a matter observed by
22 law enforcement personnel or in a civil case or against the
23 government in the criminal case factual findings from a legally
24 authorized investigation and neither the source of information
25 nor other circumstances indicate a lack of trustworthiness.

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1 So are you relying on (a)(3) in a civil case factual
2 findings from a legally authorized investigation?

3 MS. BORCHETTA: Your Honor, I think it could be either
4 one or three to the extent --

5 THE COURT: One is the office's activities.

6 MS. BORCHETTA: To the extent that it's in setting out
7 that this was a CCRB investigation and these are our
8 conclusions in that way it is setting out the activity of the
9 investigation and the results of it.

10 THE COURT: Let me see one of those while we're
11 talking.

12 MS. BORCHETTA: Sure. In a previous case, your Honor,
13 you have ruled that CCRB findings would come in under 808(8)
14 exception and there is a witness on our list, Joan Thompson,
15 who is or was the executive -- is the executive director of the
16 CCRB and if I can explain what I handed to the Court this is
17 Plaintiffs' Exhibit 5. The defendants have objected to this on
18 hearsay and relevancy and prejudice grounds, the entire
19 document. As the Court will see the first page is a letter
20 from the Police Department and Deputy Commissioner Julie
21 Schwartz regarding the outcome CCRB complaint and then the next
22 three pages are the CCRB findings letter.

23 THE COURT: So this cover letter tells the citizen, I
24 guess, Ms. Acevedo, this is how we disposed of the CCRB case
25 number whatever. Well, actually it doesn't say that. It says

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1 that the CCRB has referred the case to the Police Department.
2 An review of the CCRB file will be conducted and you will be
3 advised of the final action taken.

4 Is it attached? Does the citizen get this?

5 MS. BORCHETTA: Yes, your Honor. This was sent to
6 Ms. Acevedo.

7 THE COURT: Then Ms. Acevedo gets from the CCRB the
8 findings?

9 MR. CHARNEY: Yes.

10 THE COURT: The board reviewed the evidence and I am
11 now writing to you to inform you of the board's findings. It
12 summarizes the allegation and it gives the board's findings.
13 There is also attached an explanation report defining the words
14 "substantiated," "unsubstantiated," "exonerated," "unfounded,"
15 "officers unidentified" and "miscellaneous."

16 MS. BORCHETTA: Your Honor, so if a few preliminary
17 points. These largely I believe come from Ms. Thompson who is
18 a witness on our list.

19 THE COURT: Who is Ms. Thompson?

20 MS. BORCHETTA: She is the executive director of the
21 CCRB.

22 THE COURT: Right.

23 MS. BORCHETTA: We would like to admit these records
24 in order to establish that the NYPD was informed of the CCRB
25 finding's because then that prompts or doesn't prompt certain

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1 actions by the NYPD that we then will have witnesses to
2 testify.

3 THE COURT: Let me understand this. It is twofold
4 purpose I guess. Ms. Thompson is actually going to testify?

5 MS. BORCHETTA: Yes, your Honor. We would like to
6 avoid her having to look at every one of these.

7 THE COURT: She will testify to the procedure and she
8 will say it is the practice that when a citizen makes a
9 complaint to send the citizen the letter with the findings.

10 MS. BORCHETTA: Correct, your Honor.

11 THE COURT: She will also say I gather that she sends
12 it to the Police Department?

13 MS. BORCHETTA: Yes, your Honor.

14 THE COURT: That is what the cover letter says.
15 Please be advised that the CCRB has referred the case to the
16 Police Department. She will say it is the practice to send a
17 copy to the Police Department.

18 MS. BORCHETTA: Yes, your Honor.

19 THE COURT: I think I understand. Who wants to be
20 heard from the City of why shouldn't I accept these? I think
21 by the way 803(6) also works, business records. I think they
22 are business records and public records.

23 Go ahead.

24 MS. GROSSMAN: I think the first question is is the
25 purpose in terms of the plaintiffs' claim that this is being

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1 offered for --

2 THE COURT: Relevance.

3 MS. GROSSMAN: -- the relevance.

4 THE COURT: I think we should hear from Ms. Borchetta.
5 I can guess, but it is not my place to make the argument.

6 MS. BORCHETTA: Your Honor, as I was saying we believe
7 that once the CCRB informs the NYPD that, for example, an abuse
8 of authority for a stop has been substantiated that that is a
9 relevant fact that is putting the NYPD on notice. These are
10 all letters relating to class member stops. These are class
11 member witnesses who were stopped and its finding letters about
12 their stop.

13 THE COURT: So, Ms. Grossman, that certainly sounds
14 relevant that the CCRB found and substantiated the charge of
15 abuse of authority with respect to Detective Hawkins having
16 stopped Christina Acevedo or Detective DeMarco having stopped
17 Christina Acevedo or Detective Esperanza having stopped
18 Christina Acevedo. All of those are substantiated as abuse of
19 authority. The point the Police Department is made aware of
20 the CCRB findings. Again, it doesn't make the finding
21 necessarily "truthful," but it means the Police Department knew
22 that the CCRB knew that it was substantiated.

23 MS. GROSSMAN: Well, your Honor, that is one concern I
24 had had is that it should be offered for the truth because you
25 are the fact finder about whether or not the stop was based on

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1 reasonable suspicion.

2 THE COURT: You are right. All it shows is that the
3 City is on notice of the CCRB's findings. There is no question
4 that they received the CCRB's finding.

5 MS. GROSSMAN: Well, I guess the point is that the
6 City does not dispute that it has received --

7 THE COURT: Good.

8 MS. GROSSMAN: -- this letter so there is no need to
9 offer it into evidence.

10 THE COURT: Well, there is a need. If the City
11 doesn't dispute that it receives all of the CCRB reports,
12 right, so it would say as a blanket matter we have received all
13 these point. That isn't the point. What they have to show is
14 that they received notice that the CCRB concluded that certain
15 activity was an abuse of authority. It doesn't make it abuse
16 of authority. It just means again that the City is on notice
17 that the CCRB reached that conclusion. So I have to see the
18 conclusion.

19 Do you understand that it doesn't mean it is true, but
20 the City knew that the CCRB was told that there was an abuse of
21 authority by three police officers by stopping this person
22 named Acevedo. That is all

23 MS. GROSSMAN: May we have a moment to confer, your
24 Honor?

25 THE COURT: Sure.

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1 (Pause)

2 MS. GROSSMAN: Your Honor, subject to the limitations
3 that you've just expressed, we have no objection on Exhibit 5,
4 but not all the CCRB related documents that the City has
5 objected to are of the same quality. It is not the exact same
6 document. So we have other objections regarding other CCRB
7 related documents.

8 THE COURT: How can we do them as a bucket? How can I
9 say that X number of these are in? So all of those that look
10 like this --

11 MS. GROSSMAN: I would say all letters that were sent
12 to the civilian complainant by Julie Schwartz which attaches
13 the findings from the letter that was sent by CCRB to the
14 civilian complainant, we have no objection to.

15 THE COURT: They are all in.

16 MS. GROSSMAN: We can allow that to come in. That's
17 one bucket.

18 MS. BORCHETTA: Your Honor, I have a point on that
19 which is that I don't know that every single one of the
20 findings letters that we have contains the cover letter like
21 this one does.

22 THE COURT: I guess that is what we're going to turn
23 to. All of those in this format are in.

24 What is the next objection? In other words, is there
25 a different format that you are concerned about?

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1 MS. BORCHETTA: Your Honor, if I may.

2 THE COURT: I am trying to talk to Ms. Grossman.

3 Now that all the ones look like this is are in, what
4 does the next one look like?

5 MS. GROSSMAN: If I may have a moment, please?

6 (Pause)

7 MR. KUNZ: Your Honor, with your permission we could
8 show you the exhibit on the screen.

9 THE COURT: That would be great.

10 MS. GROSSMAN: I think we're talking about Plaintiffs'
11 Exhibit 8, 11 and 14. I think generally the issue with these
12 exhibits is that these are letters that were sent by the
13 Civilian Complaint Review Board to the officer who was subject
14 of the investigation and at deposition some of the officers did
15 not believe that they received the actual letter. However,
16 they don't dispute that they were aware that the charges were
17 substantiated or what the outcome of the charges were. So to
18 offer these exhibits when the witness said that he or she did
19 not receive it --

20 THE COURT: They didn't exactly say that. They said
21 they didn't remember receiving it. That is what you first
22 said.

23 MS. GROSSMAN: I don't know the exact details. One of
24 the members of the team has further details.

25 THE COURT: Right.

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1 MR. KUNZ: Your Honor, on this issue with respect to a
2 officer who received it, all the officers with respect to
3 Exhibits 8, 11 and 14, Esperanza, Hawkins and DeMarco, each of
4 them indicated they were aware of these charges that were
5 substantiated against them and a supervisor spoke to them.
6 They were not 100 percent sure if they received the document in
7 this form.

8 THE COURT: The purpose of offering this is to show
9 that the Police Department was aware of the CCRB finding.
10 You said they knew it was substantiated and that their
11 supervisor spoke to them. So clearly the Police Department as
12 a corporate entity was aware of the CCRB finding.

13 MS. GROSSMAN: No. I think it is the police officer.

14 THE COURT: No. No. No. He said and their
15 supervisor spoke to them about it. That is what Mr. Marutollo
16 just said.

17 MS. GROSSMAN: Right. But the letter that is --

18 THE COURT: I am not worried about the letter. I am
19 still saying since the sole purpose of the letter is to show
20 notice to the Police Department of the CCRB finding and the
21 finding doesn't bind me at all but just notice and Mr.
22 Marutollo said the supervisor spoke to the officer about it, of
23 course the Police Department, the entity, knew about the CCRB
24 findings.

25 MS. GROSSMAN: I knew they knew. You are right they

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1 did know. It is about misuse of a particular letter that is
2 limited because it was directed to a particular officer and to
3 impute that the supervisor received that particular letter --

4 THE COURT: No. The supervisor received notice that
5 the CCRB found the charges substantiated. It is not really
6 contested because the supervisor spoke to the officer about it.
7 So I will take the letter for that limited purpose.

8 Remember, I am not taking it to say, Gee, the CCRB
9 found it; I have to find it. I am not doing that. You point
10 out that is for this Court to decide whether the stop was a
11 good stop or bad stop. I am only saying that the Police
12 Department had notice of the CCRB finding.

13 MS. GROSSMAN: But this particular piece of evidence
14 doesn't establish that.

15 THE COURT: No. I know, but it is the quickest way to
16 get there because Mr. Marutollo conceded that the supervisor
17 spoke to the officer about the findings so of course the Police
18 Department knew.

19 MS. GROSSMAN: I am saying the officers' testimony is
20 going to establish that.

21 THE COURT: Overruled. I am taking the letter.

22 What is the third bucket, if any?

23 MR. MARUTOLLO: Your Honor, there is a third bucket
24 list area. Specifically one as example, Exhibit 7, which is
25 Officer DeMarco's CCRB interview on plaintiffs' exhibit list.

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1 I can explain basically what it is. It is the interview notes
2 made by a CCRB investigator related to this investigation.
3 However, the defendants submit that this is completely hearsay
4 because it is all the CCRB's investigator's notes. In this
5 particular example, the exact language is very significant
6 because the CCRB investigator writes that Ms. Acevedo informed
7 Officer DeMarco that he was a cop, when in fact the issue is,
8 and according to Officer DeMarco, she said he was not a cop.
9 There are important discrepancies between CCRB investigator's
10 recap of the notes and as a result it seems it would not only
11 be hearsay but confusing to witnesses and to the Court.

12 MS. BORCHETTA: Your Honor, as a category of documents
13 there were some officers who accepted the accuracy and
14 truthfulness of the statements. To the extent that they accept
15 the --

16 THE COURT: Then it is their own statement once they
17 adopt the statement. That is easy enough.

18 MR. MARUTOLLO: Your Honor, respectfully at these
19 depositions, the officers have never said unequivocally the
20 entire document.

21 THE COURT: She said some.

22 MR. MARUTOLLO: Parts.

23 THE COURT: Fine. That is very limited.

24 MR. KUNZ: I understand that, your Honor, but the
25 overlay here is that actual audio recordings of these

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1 interviews are in plaintiffs' position so there is no reason to
2 rely on a summary of a third person when they have the actual
3 audio.

4 THE COURT: It is good they have it. I would need it
5 transcribed if it is offered in evidence. I am not going to
6 listen to it.

7 MR. KUNZ: It would only be impeachment, your Honor.

8 THE COURT: I understand. No. No. If it is a
9 statement of the officer and if the officer finds the Police
10 Department or if the officer is a defendant, then it is a prior
11 statement and I would take it. It doesn't have to be
12 impeachment. It is a prior statement of a party.

13 MR. KUNZ: Right. In most cases the officers are
14 going to make the exact same statement on the stand.

15 THE COURT: That's fine.

16 MR. KUNZ: So why go and show a document that
17 summarizes the exact same document.

18 THE COURT: Only if it contradicts it.

19 MR. KUNZ: They have the audiotapes.

20 THE COURT: I understand. That's fine. It is just
21 that is probably technically hard to do. I don't know how to
22 impeach with audiotape.

23 MR. KUNZ: If they want to transcribe the tapes, they
24 can. We arranged to have a speaker here. They'll be using
25 audio.

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1 THE COURT: The bottom line is I cannot take these
2 investigator's notes for the reason that Mr. Marutollo said,
3 they are hearsay. But if the person adopts the statements or
4 that portion of the statement they adopt, then I take that
5 statement or portion of the statement. Otherwise they can be
6 used to impeach if it contradicts what the witness says from
7 the stand. If the person says something like, I never said
8 that, that officer's summary is erroneous, that is the end of
9 it unless it can be proved with extrinsic evidence, which will
10 be the tape. I think we're on the same page.

11 MR. KUNZ: Yes. So then these documents are not
12 needed for any reason.

13 THE COURT: Why do I have to do this twice? It
14 depends. If the person adopted the statement, in haec verba,
15 that paragraph two, I agree I said that. They can offer
16 paragraph two if they wish. It can also be used for
17 impeachment. If the person on the stand says, I never said
18 that, that is the end of the matter unless it can be proved by
19 extrinsic evidence, which would be the audiotape.

20 MR. KUNZ: I think that works.

21 THE COURT: So they are not coming in wholesale
22 because they are hearsay.

23 MR. MARUTOLLO: Your Honor, on the same CCRB area
24 there is one other bucket and one particular issue that I
25 wanted to bring to the Court's attention.

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1 THE COURT: Okay.

2 MR. MARUTOLLO: It is an objection that defendants
3 made to Exhibit 101 which is a CCRB complaint report written by
4 Ms. Kendra Edwards.

5 THE COURT: Sorry.

6 MR. MARUTOLLO: Ms. Kendra Edwards, who was the former
7 girlfriend of one of the plaintiffs Deon Dennis in this case.
8 Our objection to this particular exhibit is that again this
9 exhibit is hearsay. Ms. Edwards is not testifying at trial.
10 She is actually the person who made this complaint and frankly
11 it is not clear that this complaint narrative was written by
12 her or more likely by the CCRB investigator. On top of all
13 that it is not really related to the stop at issue. It is
14 related to more what took place afterwards.

15 THE COURT: The best argument is it is hearsay. Why
16 should I take this?

17 MS. VARMER: Your Honor, this document was a CCRB
18 complaint that was referred to Officer Fabio Rodriguez, who is
19 from the office of the chief of the department within the
20 precinct and who investigated the complaint. In his
21 investigation, he reviewed this exact complaint. His
22 deposition makes clear that he knew from this complaint that
23 Mr. Dennis was stopped by Officer Salmeron and Pichardo. We
24 intend to introduce this not for the truth of the matter but to
25 show that Officer Rodriguez began his investigation of this

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1 incident with this complaint.

2 THE COURT: So now as I understand it, the plaintiffs
3 are not offering it for the truth of it but solely to show
4 Sergeant Rodriguez received this and so it was on notice of its
5 contents and being on notice of its contents conducted an
6 investigation. That is the limited purpose.

7 MR. MARUTOLLO: Your Honor, this goes to a separate
8 but related point related to Sergeant Rodriguez's testimony
9 because we have objected to Sergeant Rodriguez being a witness
10 at all in this trial because as your Honor clearly stated at
11 the January 4th conference, the stop of Deon Dennis related
12 just to the stop and not to anything that happened after the
13 stop, the precinct and all that.

14 THE COURT: That's true.

15 MR. MARUTOLLO: This investigation and the allegations
16 made by Ms. Edwards relate to what happened after the stop. In
17 fact, Mr. Dennis conceded at his deposition that Ms. Edwards
18 was not present for the initial stop. So really any of her
19 allegations are moot. As a result of Sergeant Rodriguez's
20 investigation here --

21 THE COURT: Was it the same officer who stopped who is
22 being complained about?

23 MR. MARUTOLLO: No. That is the thing. The target of
24 this investigation is Officer Hayes who was not present for the
25 stop, he was nearly the arresting officer.

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1 THE COURT: If this officer is being investigated by
2 the CCRB and therefore by Sergeant Rodriguez was it part of the
3 stop why it is relevant?

4 MS. VARMER: May I be heard?

5 THE COURT: Well, of course.

6 MS. VARMER: Part of our point is that based on the
7 complaint it is clear that Ms. Edwards was complaining both
8 about the stop and about the arrest and about the disrespectful
9 behavior.

10 THE COURT: I am not interested right now about
11 anything but the stop. Was she a present or not?

12 MS. VARMER: She was present. She was not present at
13 the time that Mr. Dennis was stopped, but she came on to the
14 scene when the officers were standing there and had detained
15 Mr. Dennis.

16 MR. MARUTOLLO: She was present at time he was
17 arrested.

18 THE COURT: I cannot tell that. I cannot tell whether
19 she came on the scene when he was detained but not yet
20 arrested.

21 MR. MARUTOLLO: Well, Mr. Dennis concedes that point.
22 The plaintiff admits she was not present for the initial stop.

23 THE COURT: I got that. There is a continuum. You
24 are stopped, you are sort of detained and then you are
25 arrested. That could take a minute and a half or 10 minutes.

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1 I don't know. From the moment of stop until the moment of
2 arrest, there is an interim where you are detained sometimes
3 for questions, sometimes to show me your ID, sometimes don't
4 move, sometimes people reach into the pocket, all kinds of
5 things happen but you are not yet arrested. I don't know when
6 she came on the scene. Whether it was post-stop or pre-arrest
7 and that is the point that during this detention period he is
8 free to leave or to go. It is a standard the United States
9 Supreme Court writes about so therefore I did, too. In any
10 event, it depends when she came across the scene.

11 This is an out-of-court statement. I cannot take it
12 for its truth anyway. I am trying hard not to read it. I
13 really don't want to read it until I decide it is or is not
14 admissible. It would not be for its truth unless she wants to
15 come forward and testify. All it can be used for is to show
16 that Sergeant Rodriguez received it and based on whatever
17 complained of he conducted an investigation or didn't
18 investigated. It is like the CCRB complaints, I cannot take it
19 for its truth if she is not showing up and being subjected to
20 cross-examination. Unless Deon concedes exactly when she came,
21 and he says he was already stopped. He don't know whether he
22 was already arrested

23 MR. MARUTOLLO: Mr. Dennis indicates that she only
24 came when the officers were checking for the warrant and as a
25 result it seems as if the plaintiffs are using this warrant

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1 issue as both a sword and a shield because we're not allowed to
2 talk about the warrant and the reason--

3 THE COURT: The point I gather from your statement he
4 wasn't yet under arrest so it was the detention, that interim
5 period where you are stopped.

6 MR. MARUTOLLO: I believe he was in handcuffs. So I
7 believe he was under arrest.

8 THE COURT: I don't know. They are saying, No, he
9 wasn't in handcuffs. You are saying, Yes. I don't really need
10 to get into this level of detail. The sole purpose of this
11 document is to say that Sergeant Rodriguez received and
12 conducted an investigation. Not the contents, not the truth of
13 it. If she is not here whatever she has to say about someone
14 being rude is irrelevant to me. I don't want to know. I am
15 talking about the notice issue.

16 MS. VARMER: Your Honor, we just reserve the right to
17 review it and make appropriate redactions so it is not going
18 to --

19 THE COURT: Right. Prejudice you. I am trying not to
20 read it, but just understand the time line. The real purpose
21 is not what she has to say because she is not coming in here
22 and subjecting herself to cross-examination but that Sergeant
23 Rodriguez was given notice of something and then acted or
24 didn't act or what he did or didn't do.

25 MS. GROSSMAN: May I have a moment to confer, your
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1 Honor?

2 THE COURT: Sure.

3 (Pause)

4 MR. CHARNEY: Your Honor, may I make a suggestion with
5 respect to kind of how we deal with all is this stuff?

6 THE COURT: Yes.

7 MR. CHARNEY: This is taking a long time and I know
8 you are a busy person as are we, so we were wondering if we can
9 just do the first week's worth of plaintiffs' exhibits.

10 THE COURT: Sure. We'll use all the time we have.

11 MR. CHARNEY: Okay. The first week and then the only
12 other issue will be reports related to experts.

13 THE COURT: I forgot how we planned today. Are we
14 coming back after the luncheon recess, or did I say the
15 morning?

16 MS. GROSSMAN: Morning.

17 MR. CHARNEY: We have a lot to do as you do.

18 THE COURT: Well, I don't. I can continue this from
19 2:00 to 4:00. You don't all have to stay. You can point to
20 members of the team and we can keep going from 2:00 to 4:00. I
21 do have the time. I have many other things to do, but I don't
22 have court.

23 MS. GROSSMAN: Your Honor, the defense would propose
24 we finish with the Deon Dennis so we don't have to revisit that
25 and if we can prioritize with the first week's worth of

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1 witnesses and exhibits.

2 THE COURT: Fine.

3 MR. MARUTOLLO: A few other points related to the
4 witnesses first and then discussing the remainder of the Deon
5 Dennis exhibits. First, I guess a clarification with respect
6 to Sergeant Fabio Rodriguez, again we still assert our
7 objection based on the fact his investigation was related more
8 to alleged behavior at the precinct.

9 THE COURT: They are not going to talk about what
10 happened at the precinct. If they are talking about what he
11 investigated in terms of the street conduct, even if it
12 post-stop, pre-arrest, interim detention, that is the only part
13 of the case that is mine. In other words, up until the arrest.
14 After the arrest, we've talked about that. That is not a case
15 where we're going into damages for what happened at the
16 precinct. That was waived when the jury was waived.

17 MR. MARUTOLLO: Just a point of clarity. If the
18 investigation related to only allegations at the precinct and
19 the arrest, what is the purpose --

20 THE COURT: I already answered that.

21 MS. VARMER: Your Honor, the point of introducing the
22 testimony about the investigation is that despite being on
23 notice that the stop was an issue, Sergeant Rodriguez never
24 spoke to the stopping officers. He spoke to Mr. Dennis for I
25 think less than two minutes.

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1 THE COURT: I got it.

2 MS. VARMER: It was a deficient investigation.

3 THE COURT: That is going on the point they didn't
4 look into the stop.

5 MR. MARUTOLLO: Your Honor, Sergeant Agron is listed
6 as one of the witnesses for I believe next week. He was
7 related to the Deon Dennis incident. Sergeant Agron was not
8 physically present for the stop. He did not investigate
9 anything related to the stop. There is no indication he was
10 the supervisor of the officers, the two officers who stopped
11 Mr. Dennis. And even if the plaintiffs contend that there is a
12 roll call, which there is that indicates that he may have been
13 working that night, it was an impact overtime session that he
14 was working.

15 THE COURT: Why don't we get an offer of proof? Why
16 is this person here?

17 MS. VARMER: Your Honor, Sergeant Agron was a
18 supervisor in the same precinct as Officer Pichardo and
19 Salmeron. He was the one who organized the roll call that
20 night. He was also the sergeant who signed off on the arrest
21 of Mr. Dennis, which is the only paperwork we have because the
22 officers did not complete UF-250s. He also provides valuable
23 Monell testimony about the chain of command and failures in
24 supervision and training in his precinct. His testimony for
25 example --

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1 THE COURT: It doesn't relate to this stop at all.
2 You want to talk to him about precinct training.

3 MR. CHARNEY: Your Honor, it is our belief, and we
4 think the documents show this, that he was the assigned
5 supervisor of the unit that the two stopping officers were
6 working in on the night of the stop. It was a special overtime
7 tour that they both worked. The sergeant overseeing that tour,
8 it is our belief based on our exhibits and we plan to put in a
9 document that he was the sergeant overseeing that tour. We
10 believe he has relevant testimony. Has Ms. Hoff Varmer
11 mentioned, he signed off on the arrest report.

12 THE COURT: That doesn't interest me.

13 MR. CHARNEY: I understand, but we believe the impact
14 overtime documents do establish that he was the sergeant
15 overseeing those officers on that tour that night.

16 THE COURT: If it was, then what?

17 MR. CHARNEY: Well, if he is the supervisor then he is
18 responsible for their actions and how they behave on the
19 street.

20 THE COURT: He may be technically responsible. What
21 is he going to say in his testimony? That is of interest to
22 me.

23 MS. VARMER: One of the things he will say is that he
24 has never had a meaningful conversation with one of his
25 subordinates about whether there was reasonable suspicion to

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1 make a stop.

2 THE COURT: Any stop?

3 MS. VARMER: Any stop.

4 THE COURT: Now I understand that is he being called
5 as a general witness on precinct training and supervision
6 practices.

7 MS. VARMER: And also to show that Officer Pichardo
8 and Salmeron who stopped Mr. Dennis that night never had
9 adequate supervision of that stop.

10 THE COURT: What do you mean never had adequate
11 supervision of that stop, he never talked to them about the
12 facts after the stop?

13 MS. VARMER: Yes.

14 THE COURT: Right. He is going to say that about any
15 stop.

16 MR. MARUTOLLO: I agree, your Honor. Considering the
17 plaintiffs have 102 witnesses, including many sergeants, it
18 seems most effective to not have this person --

19 THE COURT: I don't think he can add much, but maybe
20 they don't have anybody else in that precinct to talk about
21 training or supervision and reporting and all that.

22 MR. MOORE: Your Honor, the issue of supervision is
23 obviously the critical --

24 THE COURT: Yes, it is. Is there anything anybody
25 else --

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1 MR. MOORE: To the extent the City is not complaining
2 about more supervisors are necessary --

3 THE COURT: Right. Cumulative.

4 MR. MOORE: -- we'll hear at the end there were not
5 enough supervisors.

6 THE COURT: I am asking you whether you have another
7 supervisor talking about practices in that particular precinct?

8 MR. CHARNEY: Not at the sergeant level.

9 THE COURT: Fine. You can have one sergeant. What
10 can I do? He was the supervisor in that precinct. He has no
11 knowledge of this stop. I am not going to let him wonder off
12 into something that happened afterwards in the precinct. It is
13 not going to happen. I don't have the time to waste. If they
14 want to ask him about practices as a supervisor in that
15 precinct, Mr. Marutollo, the question is going to be something
16 like that, Was it your practice after stops were made when you
17 were the supervisor of the tour was it your practice to debrief
18 the officers and find out their basis of the stop. And he will
19 say, No, I never did that. Done. Thanks for coming in.
20 Good-bye. If that is the testimony, that is the testimony.

21 MS. GROSSMAN: May I have a moment, your Honor?

22 THE COURT: Yes.

23 (Pause)

24 MS. GROSSMAN: Your Honor, I think what we need to do
25 is confer amongst ourselves and not delay on the other items

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1 because one of the concerns I have about the adequacy of the
2 investigation argument in terms of these documents having to do
3 with the investigation is that if the investigation includes an
4 aspect of the warrant issue or the --

5 THE COURT: You can parse it. I am not going to
6 listen to that.

7 MS. GROSSMAN: Right. What I am saying is if the
8 plaintiffs are going to claim that our investigation was
9 inadequate, then it becomes important for the Court to know
10 what was the part and the focus of the investigation and why it
11 is that the investigation ran a certain course as opposed to
12 the course that plaintiffs believe it should have taken. So we
13 need to just caucus on our end and let the Court know whether
14 we do have objections or we don't. And then my apologies I
15 thought if this wasn't coming in, if no part of the post-arrest
16 information was coming into evidence, then it was not an issue.
17 Now that some of it may be coming in, I am concerned.

18 THE COURT: I don't think it is. I think it is one
19 question and one answer. Agron guy is not going be on the
20 stand long. He is going to asked as a sergeant in the what
21 precinct?

22 MS. VARMER: 28th.

23 THE COURT: Was it your practice when stops were made
24 while you were the subject in charge of that tour, did you
25 debrief the officers when they made a stop? Did you go over

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1 it? Did they complete a 250? Did you look at the arrest
2 report? After a series of no answers, he will leave the
3 courtroom.

4 MS. GROSSMAN: With Agron I was actually, because this
5 is all related to the same plaintiff, Deon Dennis, going back
6 to the Rodriguez issue.

7 THE COURT: Oh.

8 MS. GROSSMAN: My apologies. I am just concerned if
9 the plaintiffs are allowed to offer in some of this information
10 and to go to their claim that our investigations were
11 inadequate --

12 THE COURT: Investigations of the stop. You have to
13 have some faith. The Court does not want to sit here for four
14 months. I want to City here for the two months and not a day
15 more. I am going to limit it. I am only interested in an
16 investigation, if any, about the circumstances of the stop. I
17 don't want to know if they looked to whether people were rude
18 at the precinct.

19 MS. GROSSMAN: I understand that. Whatever the
20 investigation into the stop was --

21 THE COURT: Or wasn't.

22 MS. GROSSMAN: -- or wasn't you will hear. But to
23 that end we would like the opportunity to at least explain that
24 the reason why the Police Department did not look into the
25 circumstances of the details of the stop is that from their

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1 perspective the focus of the complaint was really the warrant.

2 THE COURT: That doesn't take very long.

3 MS. GROSSMAN: That's fine, your Honor. As long as
4 we're free to develop that.

5 THE COURT: Briefly.

6 MS. VARMER: Your Honor, one point on that. There are
7 a host of documents on defendants' exhibit lists and actually I
8 handful of documents on plaintiffs' exhibit list that I think
9 are only on the list to the extent that the warrant and the
10 adequacy of the arrest is at issue. To the extent that --

11 THE COURT: I don't think it is. This is about a
12 stop, when the stop was made. Was the officer trying to
13 enforce a warrant?

14 MR. CHARNEY: No.

15 MS. VARMER: No.

16 THE COURT: Then it is of no interest.

17 MR. MARUTOLLO: That is not accurate, your Honor.
18 Sorry to interrupt. During the course of the stop that is when
19 the warrant was learned of.

20 THE COURT: I understand that. The basis for stopping
21 someone -- it was not like they were sending the squad out
22 looking for people who run on warrants. We have that. The
23 marshals here have a warrant squad and they go out and look for
24 John Doe on an outstanding warrant. They are looking.

25 MS. VARMER: Your Honor --

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1 MR. MARUTOLLO: Just two points. On plaintiffs'
2 exhibit list, they still include a decline to prosecute form, a
3 prisoner roster form. These are clearly irrelevant.

4 THE COURT: They are clearly relevant?

5 MR. MARUTOLLO: Irrelevant.

6 MS. VARMER: They are relevant to the extent the
7 defendants are allowed to introduce evidence of the warrant.

8 THE COURT: Please, I am trying to make this simpler.
9 The warrant is of no interest to me. It is not the basis for
10 the stop, period. As I said we have a warrant squad here, the
11 marshals, if somebody has an open warrant, they send out a
12 squad looking for him or her -- well, never her -- looking for
13 him to close the open warrant. That wasn't the case here.
14 They made a street stop. The only issue is the basis for the
15 stop. I understand that once he was stopped, the warrant
16 information is developed. Maybe that goes to the free-to-leave
17 issue when in that stop did they realize there was an
18 outstanding warrant up until that time there was a basis for
19 the stop, was he free to leave. Once they figured out the
20 warrant, he was not free to leave but for a different reason.
21 Now they have an open warrant.

22 MS. GROSSMAN: Our officers stopped him because they
23 had probable cause to issue a summons for open container. It
24 wasn't even a reasonable suspicion stop.

25 THE COURT: Good.

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1 MS. GROSSMAN: From our standpoint when we then check
2 for a warrant and then we arrest him, we bring him into the
3 precinct. So the investigation is focused on the warrant.

4 THE COURT: I got it.

5 MS. GROSSMAN: It is hard to know how this is going to
6 play out next week. So we just want to reserve the right to
7 address any claim that the investigation was inadequate if that
8 is where this is going.

9 THE COURT: Obviously the plaintiffs disagree with the
10 reason for the stop is the open container.

11 MS. VARMER: Your Honor, to the extent that they are
12 reserving the right to introduce documents about the warrant,
13 then I would also reserve the right to introduce documents
14 about the invalidity of the warrant.

15 THE COURT: Look, I don't want to go into this
16 warrant. I don't think I am.

17 MS. VARMER: Neither do we. We would prefer to strike
18 the whole lot of these documents, but to the extent they are
19 allowed to talk about why he was arrested, we should be able to
20 talk about why it was completely pointless.

21 THE COURT: I don't think they are allowed to talk
22 about why he was arrested. The only reason that comes up
23 Ms. Grossman argues is that your complaint that the
24 investigation is inadequate. They need to defend the
25 investigation by saying he was arrested on a warrant,

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1 rightfully arrested or rightfully held and rightfully brought
2 to the precinct all based on the warrant. I don't want to go
3 there. It depends on how much you focus on the adequacy of the
4 investigation. If you never say that, they will never say the
5 word "warrant." We'll just look at the stop circumstances,
6 period. If you want to go into the adequacy of the
7 investigation, they have to point out eventually he is arrested
8 on a warrant.

9 MS. VARMER: Your Honor, two points.

10 THE COURT: We're not moving very quickly if this is
11 going to take us a half hour per exhibit. We'll be here for
12 months pretrial.

13 MS. VARMER: Your Honor, the first is that the
14 investigation is easily decided between the warrant and the
15 stop.

16 THE COURT: That's what I am hoping.

17 MS. VARMER: We'll be happy to redact --

18 THE COURT: Good. Do it. Limit your exhibits and
19 documents and let's see what you offer.

20 Now what are we doing?

21 MR. CHARNEY: Can we address the expert exhibits, and
22 Mr. Hellerman is going to do that. Hopefully it will be quick.

23 MR. HELLERMAN: Thank you, your Honor. We're on
24 plaintiffs' exhibits so I will address Officer Fagan's reports
25 and declarations. Admitting them we believe with appropriate

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1 redactions, because there are parts of his proposed opinions
2 that your Honor has ruled cannot give, we think will streamline
3 the trial.

4 THE COURT: Admitting what?

5 MR. HELLERMAN: Admitting Professor Fagan's reports
6 and declarations that he has put in that express his various
7 opinions.

8 THE COURT: You oppose all reports and declarations,
9 even portions of them?

10 MS. COOKE: No, your Honor. We were the first party
11 to put in expert reports on our exhibit list. That was based
12 on my involvement in the Ligon and you said, Of course the
13 expert reports are coming in. The expert reports were
14 indicated as exhibits. The objections were made to improper
15 designation of the expert report and all reference materials
16 cited therein as the exhibit. So we think the report, the
17 analysis of the report, the opinions in the report and
18 certainly appendixes to the report, but not for the truth of
19 the matter or into the evidence, every article cited and
20 footnote and reference source. That seems overly broad and
21 inappropriately designated.

22 MR. HELLERMAN: Your Honor, I think perhaps our
23 exhibit description could have been written better. We're not
24 asking the Court to admit every reference that Professor Fagan
25 cited.

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1 THE COURT: Good.

2 MR. HELLERMAN: We're asking for the admission of the
3 reports and everything in the reports, other than that that
4 should be redacted.

5 THE COURT: And not by incorporation of references?

6 MR. HELLERMAN: No.

7 THE COURT: If he cites an artical, the article is not
8 in evidence.

9 MR. HELLERMAN: That's right. If it is in the report
10 or appended to the report --

11 THE COURT: Yes. It seemed you are in agreement.

12 MS. COOKE: If I may further add. One additional
13 thing the defendants in preparing for this conference I noticed
14 that we had inadvertently deleted the second supplemental
15 report of Smith and Patel in response to Professor Fagan's last
16 report. So I will add that to the end of our exhibit list.

17 THE COURT: You should follow that up with a letter.

18 MS. COOKE: We will.

19 THE COURT: Saying what you just said.

20 MS. COOKE: Yes, your Honor.

21 With respect to several of the plaintiffs' objection
22 to defendants' exhibits report with reference to declarations
23 filed by Professor Smith and/or Professor Patel, those
24 declarations contain substantive analysis. They were in
25 response to the Daulbert motions. Those are regression in

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1 opinions and analysis and we believe those are just as
2 appropriate as exhibits as the reports.

3 MR. HELLERMAN: I think that the Smith materials are a
4 little bit different from the Fagan materials. So much of what
5 professor Dr. Smith put in his expert report had been ruled out
6 that --

7 MR. CHARNEY: By you.

8 MR. HELLERMAN: -- by you, your Honor, that what is
9 left is mostly hearsay statements about police practices, which
10 he cannot testify is the truth.

11 THE COURT: Well, no, but experts often rely on
12 statements of others to form their experts opinions. That
13 happens in every case. I am sure you worked with many experts
14 in many other kinds of cases. So experts rely on other
15 people's statements. When you take that for what they
16 considered, they say I considered this and this in reaching my
17 opinion. Everyone understands those are out-of-court
18 statements, but the expert is saying this is the basis of my
19 opinion. I will take that.

20 Your first point is a better point, which is saying if
21 I ruled out, for example, Smith's testimony about how effective
22 this program is for lowering crime, that is not an issue in
23 this trial. I explained why. You can do a lot of bad things
24 to stop crime and they wouldn't be constitutional but they
25 would work but we don't do that. That is not something I am

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1 going to allow. If some of this Smith declaration material
2 goes to how wonderful the program is -- I am not supposed to
3 say "program" -- practice, how wonderful it is in reducing
4 crime, that part is out. So you need to redact these
5 declarations so that the portions I have said are not coming in
6 are not coming in.

7 MS. COOKE: Right. With respect to Professor Smith's
8 ability to be testify with respect to his expertise and
9 experience in police practice that was not the subject of your
10 Daulbert ruling.

11 MR. HELLERMAN: I am not addressing the efficacy
12 issue. I am addressing Professor Smith's statements about what
13 the police do. He may have expertise in this, but the
14 statements in his report are without attribution.

15 THE COURT: They come from him. That's his expertise.

16 MR. CHARNEY: He doesn't work for the NYPD.

17 THE COURT: He doesn't need to. He is an expert in
18 police practices.

19 MR. CHARNEY: He is, but he is not saying generally
20 this is what the police do. He says the NYPD does this
21 specific thing.

22 THE COURT: He is a professor.

23 MS. COOKE: He studied, your Honor, operations impact
24 extensively.

25 THE COURT: I am allowing it. I am allowing it.

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1 MR. HELLERMAN: We will work with the defendants on
2 redactions.

3 THE COURT: Okay.

4 MR. HELLERMAN: Just to clarify, your Honor, once the
5 expert report comes in, you don't need a separate exhibit, for
6 example, the Professor's CV and data and sources. It is all in
7 the report.

8 THE COURT: If it is in the report, that's fine.

9 MS. COOKE: I would propose that Mr. Hellerman and I
10 will work it out and exchange proposed redactions. They are
11 not on for many, many weeks. Fagan will be much earlier. So
12 we'll work on Fagan first.

13 The other point I would note, and I don't know how
14 this will be dealt with in redactions, but as your Honor may
15 recall in the course of the Daulbert that the defendants made
16 with Professor Fagan to his report, there were corrections and
17 errors of significant quantities -- hundreds of thousands of
18 stops -- so his report is inaccurate in those representations
19 and we've had a series of subsequent reports from Professor
20 Fagan but the original report with the errors your Honor ruled
21 in the Daulbert motion with respect to those, but I don't know
22 if we can redact that. I don't know how your Honor will prefer
23 to do that.

24 THE COURT: Maybe you can mark it with a red marker,
25 circle that paragraph and say "conceded that it needed

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1 corrections," or "conceded to be erroneous, corrected later,"
2 or something in the margin so that when I review it, it helps
3 me to recall that he conceded he had to redo that portion based
4 on my ruling.

5 MS. COOKE: Yes.

6 MR. HELLERMAN: Your Honor, with respect to the extent
7 that that an error that he omitted pertained to an opinion that
8 you later ruled that he cannot give, we would propose to redact
9 that.

10 THE COURT: That's better. That's fine, too. If he
11 didn't correct it but withdrew it, that's fine.

12 MS. COOKE: Well, I think the mistakes I am referring
13 to by Professor Fagan was with respect to classification for
14 reasonable suspicion analysis and then the numbers and the
15 quality of certain few hundred thousand stops were erroneously
16 included.

17 THE COURT: But you redid the figures at a later
18 version?

19 MR. HELLERMAN: Which he did, your Honor.

20 THE COURT: Yes. As I said mark it off.

21 MS. COOKE: Identified in the original.

22 THE COURT: Yes. Refer me to the revised.

23 MS. COOKE: Mr. Hellerman will do that for Fagan and
24 then we'll exchange.

25 THE COURT: Good.

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1 Now what?

2 MR. CHARNEY: So I think maybe the most efficient is
3 to do -- if there are any other objections that the defendants
4 have to the first week's worth of exhibits.

5 THE COURT: Let's do it.

6 MS. COOKE: I have an objection, your Honor.

7 THE COURT: Okay.

8 MS. COOKE: To a Exhibit 332.

9 THE COURT: One second. 332, audio recording by
10 Officer Serrano.

11 MS. COOKE: Your Honor, let me explain this exhibit.
12 We were in court on May 5th for a conference and on the
13 evening --

14 THE COURT: May 5th?

15 MS. COOKE: March 5th. On the evening of March 7th
16 the plaintiffs notified us by e-mail that they were producing
17 what is now Exhibit 332. So for the first time on March 7th we
18 became aware of this recording.

19 THE COURT: What is this recording?

20 MS. COOKE: It is a recording of Officer Serrano, who
21 is an officer at the 40th precinct made of a conversation that
22 he had at the 40th precinct that occurred on February 14th,
23 2013. The date is important. So we were informed our
24 March 7th that we were getting this recording. On March 12th
25 per your Honor's direction Officer Serrano provided the

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1 defendants with an affidavit with respect to recordings. In
2 the affidavit Officer Serrano states that he provided that
3 recording to plaintiffs' counsel on March 1st. Plaintiffs'
4 counsel didn't identify the March 5th conference when we talked
5 about an affidavit on the other two audio recordings that they
6 were in possession of a third they intended to use.

7 THE COURT: Third what?

8 MS. COOKE: Third audio recording that they intended
9 to use. We provided notice on March 7th. I received the
10 affidavit on the 12th, which indicated when they provided it,
11 March 1st and on I believe also on March 12th the plaintiffs
12 identified by the affidavit that actually a second version of
13 that audio recording was going to be provided or replacement
14 copy. The replacement copy is substantively different than the
15 original copy I received on March 7th. That is because the
16 original copy as I understand from Officer Serrano's affidavit
17 he played the audio from a device and recorded it that way.
18 Then the second time he actually downloaded the audio from his
19 device. There are substantive differences in the recordings.

20 THE COURT: When you say "substantive," you mean the
21 quality?

22 MS. COOKE: Content. There is content. There is dead
23 air and some content at the beginning of the original recording
24 I received plus about six minutes of what sounds like traffic
25 noise and a baby crying and some other things at the end. The

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1 second recording I received is a downloaded version. So it
2 doesn't include the noise.

3 THE COURT: So that is good. We're all saved from
4 listening to the noise.

5 MS. COOKE: My point is, your Honor, I was not able
6 until yesterday when I received the recording to start matching
7 up the plaintiffs' intended use and designation portions of
8 this exhibit. I believe it was untimely produced by the
9 affidavit the plaintiffs had it on March 1st. We were in court
10 on March 5th. It was produced late on March 7th. It is not
11 even one they intended to use.

12 THE COURT: Does he say when he gave them the other
13 versions?

14 MS. COOKE: On march 11th.

15 MS. BORCHETTA: May I?

16 THE COURT: You got it on March 12th.

17 MS. BORCHETTA: Your Honor, there were technical
18 difficulties here. He provided us something on March 1st I
19 believe but we couldn't -- there were technical problems in our
20 receipt of it. We provided it to the defendants.

21 THE COURT: You received it six days later.

22 MS. BORCHETTA: Sorry. As soon as we were able to get
23 the recording, we provided it.

24 THE COURT: As soon as you were able to make it work
25 so to speak, listen to it?

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1 MS. BORCHETTA: Right. Thereafter, as your Honor
2 directed us to do preparing his affidavit, which included
3 authenticating these recordings, we learned that he had played
4 his cell phone recording, which is how he recorded this
5 conversation, and then with another hand recorded it with
6 another device. We anticipated that the defendants might
7 object on authenticity grounds so we brought him in on Monday,
8 got the technology person to figure out how to get it off the
9 phone and put it onto a disk and we immediately hand-delivered
10 it to the defendants.

11 We also provided when the defendants yesterday
12 indicated there were some delivery issues on their end with
13 their mailroom, we went through the designated portions on that
14 recording and gave them descriptions so they could find them on
15 the recording they already have. We were addressing an
16 authenticity issue. We resolved it. It is not that much time
17 in total.

18 THE COURT: The one you received on the 11th, how long
19 is that whole recording?

20 MS. BORCHETTA: The whole recording, your Honor, is
21 about 30 minutes. It is about 15 minutes of dead air or people
22 talking in the hallway. It is about 15 minutes of substance.

23 MS. COOKE: Your Honor, further to my objection to the
24 late production of this exhibit, the recording is of a meeting
25 that occurred on February 14th. This witness is listed as, I

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1 believe, their seventh or eighth witness testifying at trial.
2 This witness was, as you recall, a witness that was not
3 identified until the very last day of 2012 per your Honor's
4 direction. So this entire issue with respect to this witness
5 and the number of witnesses I have had to identify to defend
6 against, we're prejudiced by the untimely production of an
7 audible that was in the plaintiffs' possession for at least six
8 days provided.

9 THE COURT: I can't really find that the plaintiffs
10 did anything wrong. When they got it, it wasn't apparently in
11 usable workable condition due to technical problems. By the
12 time they got it to work so to speak, they turned it over
13 immediately. Then when authentication was raised, they figured
14 they better try to get the closest to the original. They
15 talked to the fellow and he said, Well, this is how I did it, a
16 cell phone here, other device here, so I am giving you
17 everything, the originals, the best, you figure out that what
18 to do with it. It sounds like they gave it to you the next
19 day. They got it the 11th and gave it to you the 12th. It is
20 not like it has been in existence three years. It only
21 occurred a month ago today. It is 15 minutes of substance.
22 Get your technical people, get a transcript and that's it.

23 MS. COOKE: Your Honor, to that the witness is being
24 called in the first week of trial, I would raise that again.
25 To the extent that there are people identified, there are

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1 others speakers, I dispute the characterization that most of
2 the tape or half of the tape is not of substance. There is
3 content and speaking the entirety of the tape. It is a long
4 meetings with respect to Professor Serrano's --

5 MR. MOORE: Officer.

6 MS. COOKE: Sorry. Officer Serrano's performance
7 evaluation. There are several speakers on the tape, some of
8 which the plaintiffs have identified, some of which they have
9 not. I reserve the right, your Honor, to call additional
10 witnesses.

11 THE COURT: If you have to call additional witnesses,
12 that's fine.

13 MS. COOKE: I note for the record, your Honor, the
14 defendants object to the inclusion of this as evidence.

15 THE COURT: It was late-breaking evidence that is for
16 sure.

17 MS. GROSSMAN: Your Honor, for next week Plaintiffs'
18 Exhibit 25.

19 THE COURT: Wait. I have a lot of pages to go through
20 to get back to 25.

21 MS. GROSSMAN: I am sorry, your Honor. Just to stay
22 focused on Serrano-related issues, Ms. Cooke is going to
23 address another thing.

24 MS. COOKE: One more, your Honor. I am trying to find
25 the number. It is 294.

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1 THE COURT: 294?

2 MS. COOKE: Yes.

3 THE COURT: Arbitration order?

4 MS. COOKE: The plaintiffs have indicated they intend
5 to use this exhibit of Officer Pedro Serrano from the 40th
6 precinct. This is an arbitration decision and order with
7 respect to Deputy Inspector McCormick from when he was the 20th
8 precinct in Manhattan with respect to a grievance made by an
9 Officer Rajinder Singh. Officer Singh filed a grievance
10 against the Police Department with respect to his captain at
11 the time, Deputy Inspector McCormick at the 20th precinct.
12 Inspector McCormick is now the commanding officer at the 40th
13 precinct. This arbitration decision and order with respect to
14 Rajinder Singh's grievance is not a substantive decision on the
15 merits. It is a decision on the issue of the arbitrability of
16 Rajinder Singh's claim under the collective bargaining
17 agreement. It is not dispositive.

18 THE COURT: Why is this here? I don't want this.

19 MS. BORCHETTA: Your Honor, in abundance of caution
20 put this on our exhibits for the first week.

21 THE COURT: In abundance of kindness will you withdraw
22 it?

23 MS. BORCHETTA: No, no. With respect to Officer
24 Serrano, but we believe we should be able to use it with
25 Captain McCormick, who is a later witness.

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1 MS. COOKE: Inspector.

2 THE COURT: Why?

3 MR. CHARNEY: A grievance about quotas was filed
4 against him.

5 THE COURT: It is a grievance.

6 MR. CHARNEY: It goes to notice, your Honor. If the
7 same precinct commander who --

8 THE COURT: This decision is a decision about
9 arbitrability by some arbitrator. I am not interested in
10 reading it. It shouldn't be included in the record. Is there
11 not another way that you can produce evidence that somebody
12 filed a grievance?

13 MS. COOKE: Your Honor, we produced a grievance file
14 of Rajinder Singh, which includes endorsements from the Police
15 Department.

16 THE COURT: If you want to prove notice that the
17 Police Department had notice that somebody was complaining
18 about Inspector McCormick, you have done it. She said you gave
19 the evidence to do it. This arbitration decision should not be
20 cluttering my record.

21 MR. CHARNEY: Well, if they are going to object to
22 that--

23 THE COURT: Just for the purpose of notice that the
24 Police Department knew that somebody complained about this
25 inspector.

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1 MR. CHARNEY: For this exact same thing that Officer
2 Serrano is complaining about just to make it clear.

3 THE COURT: It is okay to show the notice of what the
4 complaint was. It doesn't have any validity or truth with me,
5 but the notice issue I have ruled three different times today
6 and three different contexts that, yes, you can show that the
7 City knew that a complaint saying X, Y, Z was made. It doesn't
8 make it true but they knew. Whatever the complaint says, it
9 says in terms of the notice issue. Let's get rid of the
10 arbitration.

11 MR. CHARNEY: We have the right to supplement our
12 exhibit lists with some of these notices.

13 THE COURT: If you didn't put them in, yes. They are
14 allowed to show that somebody made a complaint.

15 MS. COOKE: I agree with your Honor's characterization
16 by Mr. Charney that they were the same claims not to be
17 determined. We're not conceding that.

18 THE COURT: Of course not.
19 And now Exhibit 25?

20 MS. GROSSMAN: Yes. That a May 4th --

21 THE COURT: One second. NYPD tapes?

22 MS. GROSSMAN: No.

23 THE COURT: Yes.

24 MS. GROSSMAN: May 4th, 2010 article.

25 THE COURT: Yes, village Voice article. It says
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1 May 3rd, 2010 here. It is a newspaper article.

2 MS. GROSSMAN: Yes, your Honor. The newspaper article
3 concerns quotes from audio tapes that are on the plaintiffs'
4 exhibit list and will be played the first week of trial.

5 THE COURT: What do I need the newspaper article for?

6 MR. CHARNEY: The article does more than quote the
7 recordings. It talks about the different players involved in
8 those recordings.

9 THE COURT: The article itself is hearsay.

10 MR. CHARNEY: Exactly. Your Honor ruled in January
11 and we made it clear at that point that we're not offering it
12 for the truth.

13 THE COURT: What are you offering it for?

14 MR. CHARNEY: For notice?

15 THE COURT: Notice to whom about what?

16 MR. CHARNEY: To certain witnesses who will testify
17 about what happened in the 81st precinct, their knowledge of
18 it, what their response to it was.

19 THE COURT: To the article?

20 MR. CHARNEY: Well, because, yes. The article came
21 out and it caused a great sensation in the media circles in the
22 City. The Police Department was asked about these allegations.
23 We're not offering it for the truth. We have always said we're
24 not offering any newspaper articles for truth of the matter
25 asserted in there. We'll use it solely for notice.

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1 THE COURT: Notice -- finish the sentence.

2 MR. CHARNEY: Notice to high-ranking New York Police
3 Department officials including commanders.

4 THE COURT: How do we know the commanders saw this
5 article because they responded?

6 MR. CHARNEY: Well, the matter asserted therein, we
7 can ask them if they have knowledge of it, does this refresh
8 your recollection of what happened back in May.

9 THE COURT: You can use anything to refresh
10 recollection. We all learned that in law school. I remember
11 that. A tree trunk, papyrus, does it refresh your
12 recollection. The witness can say, No, or, It doesn't refresh
13 me. Sure you can use it to refresh recollection.

14 MR. CHARNEY: To the extent certain officials are
15 quoted in those articles, we think we should be allowed to ask
16 them about it generally.

17 THE COURT: That is cross-examination. Did you say
18 this, and the person can say, Never.

19 MR. CHARNEY: On the issue of notice to the extent
20 that certain statements are attributed -- not the statements on
21 the recordings, statements about the NYPD learning of this
22 situation in the 81st precinct, what their response to it was.

23 THE COURT: If they responded to article, they surely
24 received the article.

25 MS. GROSSMAN: Your Honor, I think the reason why this
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1 is coming to my attention now is this is one of the exhibits
2 where Inspector Mauriello, who will be testifying next week --
3 so Inspector Mauriello was deposed. There are audio tapes that
4 are going be played so to the extent that this article is
5 giving Inspector Mauriello notice about what he said on the
6 audio tapes, that purpose doesn't make sense.

7 MR. CHARNEY: That's not why we are offering it.

8 MS. GROSSMAN: If the plaintiffs are saying they want
9 to use it for another witness to show notice, that may be. But
10 for this witness coming up next week, which is what I am
11 focusing on, this article should not be used for that purpose
12 because we have the tapes. The plaintiff has been deposed.

13 THE COURT: I think it would be cumulative to use it
14 for the point of saying he had notice.

15 MS. GROSSMAN: Right.

16 MR. CHARNEY: We will not use it to try to show he had
17 notice of what was said on the tapes. We would use it to show
18 whether or not he had notice that there was outcry about what
19 had happened.

20 THE COURT: Why don't you just ask him.

21 MR. CHARNEY: We will. We are trying to protect
22 ourselves in a situation where he denies it. At his
23 deposition -- his notice of these things was a lot -- seemed to
24 us seemed be to be a lot smaller than we would have expected
25 given what we heard on the recording.

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1 THE COURT: Basically he is saying he is holding it in
2 reserve for impeachment if the person denies knowing.

3 MR. CHARNEY: Yes, your Honor.

4 THE COURT: I think we should stop now. Now the
5 question is should we reconvene?

6 MR. CHARNEY: One last issue about first week
7 witnesses?

8 MS. PATEL: I think this will take one minute.

9 THE COURT: I hope so.

10 MS. PATEL: It is really to clarify an evidentiary
11 issue that came up on January 4th in the motion in limine
12 conference. The defendants raised the issue that they wanted
13 to exclude the testimony of plaintiffs where officers were
14 unidentified and what they wrote in their letter was how they
15 were told about the basis of their stops. There was an
16 argument around that issue. I want to clarify that the
17 plaintiffs are not intending to offer those statements by and
18 large for the truth of the matter asserted. We don't actually
19 think that there is a hearsay issue here. For example, when
20 the officer says, Put your hands against the wall, it is to
21 give context and explain the action of the plaintiff. I wanted
22 to clarify that we don't actually think -- there may not be
23 disagreement and I wanted to make sure the defendants --

24 THE COURT: It may depend on what the alleged
25 statement is. If the alleged statement was, Put your hands

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1 against the wall, there is no truth in that anyway. It is an
2 assertion or command. If the statement is a racial epithet or
3 something like that or bad words, I don't know what that is,
4 but we don't know the speaker and the attribution made. It is
5 hard to contest that. I don't know what you are asking me
6 honestly.

7 MS. PATEL: Well, at the conference your Honor
8 suggested that we raise with you any statements that we believe
9 would fit within this motion in limine so that you could have
10 time in advance to rule or research.

11 THE COURT: Why give me any specific other than put
12 your hands against the wall?

13 MS. PATEL: In general none of them are being asserted
14 for the truth of the matter. So put your hands against the
15 wall, they asked me for ID, they asked me where I was going,
16 they asked me if I had drugs or weapons in my pocket -- none of
17 these are for the truth of the matter asserted.

18 THE COURT: For the fact that the statement was made.

19 MS. GROSSMAN: Your Honor, it is very hard to respond
20 without knowing. I need something in writing so I can figure
21 out -- if this is the representation, these three statements,
22 we need time to caucus. If there are any other statements, I
23 want to know that immediately because I want to be able to
24 address it and to the delay the trial.

25 THE COURT: Right now the statements that she gave,
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1 and she gave it was more than three, four or five questions,
2 those are for the fact that the statement was made or assertion
3 was made, not for the truth of it.

4 MS. GROSSMAN: I don't know the difference between
5 that.

6 THE COURT: It is a verbal act. It is an act. That
7 is all it is. In other words, do you have any guns or drugs.

8 MS. GROSSMAN: The witness can say, I had to put my
9 hands against the wall instead of saying an officer told me to
10 put my hands against the wall.

11 THE COURT: No. I will allow it, The officer told me
12 to put my hand against the wall.

13 Do you want to come back at 2:00 or not?

14 MR. CHARNEY: No.

15 THE COURT: I didn't mean it was enjoyable. Are we
16 doing something effective or should we stop for today and I
17 will see you Monday morning?

18 MS. GROSSMAN: We have other issues that are going to
19 be --

20 THE COURT: See you at 2:00.

21 MS. PATEL: Would it be possible to clarify that?

22 THE COURT: No. I can't right now. I am now late to
23 meet someone.

24 (Luncheon recess)
25

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AFTERNOON SESSION

2:10 p.m.

THE COURT: Where should we pick up?

MS. BORCHETTA: Actually, we have been able to work out the remaining objections for the next week's exhibits. We just didn't want to leave, since you had said you were coming back to speak with us, in case there was anything additional you wanted to address.

THE COURT: No. Do you want to put any agreements on the record or somebody was seeking some clarification when I had to leave. If you don't need me, I am ready to leave the bench.

MS. BORCHETTA: We're fine.

MS. GROSSMAN: The city is fine.

THE COURT: OK. Thank you.

See you Monday.

Who is doing the openings?

MS. BORCHETTA: Darius Charney is doing it for plaintiffs.

MS. GROSSMAN: Myself.

THE COURT: OK. Thanks.

(Adjourned)

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